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Supreme Court of the United States

OCTOBER TERM, 1963

No. 32

THE HONORABLE JAMES B. PARSONS, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, PETITIONER,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 8, 1963
CERTIORARI GRANTED JANUARY 7, 1963

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 573

THE HONORABLE JAMES B. PARSONS, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, PETITIONER,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September Term 1961

No. 13701, Original

Ex Parte:

In the Matter of the

CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner.

MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS—
Filed April 12, 1962

Now comes the petitioner, The Chesapeake & Ohio Railway Company, by its attorneys, Charles J. O'Laughlin, Holland C. Capper, and Thompson, Raymond, Mayer & Jenner, and respectfully moves this Court:

1. For leave to file the petition, hereto annexed, for a writ of mandamus under Section 1651 of Title 28 of the United States Code.

2. That a rule be entered and issued directing the Honorable James B. Parsons, a Judge of the United States District Court for the Northern District of Illinois, Eastern Division, to show cause why a writ of mandamus should not issue against him, in accordance with the prayer of the petition, and why petitioner should not have such other and further relief as may be just and proper.

The Chesapeake & Ohio Railway Co., Petitioner,
By: Charles J. O'Laughlin, One of its Attorneys.

Holland C. Capper, Thompson, Raymond, Mayer & Jenner, 135 South LaSalle Street, Chicago 3, Illinois, Of Counsel.

[fol. 2]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

September Term 1961

No. 13701, Original

Ex Parte:

In the Matter of the

CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner.

PETITION FOR WRIT OF MANDAMUS

To the Honorable Justices of the United States Court of Appeals for the Seventh Circuit:

1. Petitioner, The Chesapeake and Ohio Railway Company, is a corporation incorporated under the laws of the State of Virginia, and does business in other states including the State of Michigan and the State of Illinois.

2. On February 10, 1961, a complaint was filed in the Circuit Court of Cook County, Illinois against the petitioner, captioned *Jack J. Filbrun, Plaintiff* vs. *The Chesapeake and Ohio Railway Company, a corporation, Defendant*, No. 61 C 2214. A copy of this complaint is attached to this petition as Exhibit A.

3. On April 17, 1961, petitioner filed in the said action a motion with supporting affidavit to dismiss the complaint on the ground that the Circuit Court of Cook County was an inconvenient and inappropriate forum for the trial [fol. 3] of the said action. A copy of this motion with supporting affidavit is attached to this petition as Exhibit B. A copy of Filbrun's answer to said motion, with supporting affidavit, is attached to this petition as Exhibit C.

4. The case came on for hearing before the Honorable Thomas E. Kluczynski, a Judge of the Circuit Court of

Cook County, Illinois, on the motion to dismiss and the answer thereto and affidavits in support and opposition to the motion. The Honorable Thomas E. Kluczynski entered an order on May 15, 1961, dismissing the action on the ground that the Circuit Court of Cook County, Illinois was an inconvenient and inappropriate forum. A copy of this order is attached to this petition as Exhibit D.

5. On May 26, 1961, a petition with accompanying affidavit for a "Rehearing of Motion to Dismiss and Motion to Vacate Order Dismissing Cause" was duly presented by Filbrun and filed. A copy of this petition and affidavit is attached to this petition as Exhibit E.

6. On June 8, 1961, the Honorable Thomas E. Kluczynski entered an order denying Filbrun's petition for "Rehearing of Motion to Dismiss and Motion to Vacate Order Dismissing Cause." A copy of this order is attached to this petition as Exhibit F. No appeal was taken from this order.

[fol. 4] 7. On July 11, 1961, Filbrun filed an action in the United States District Court for the Northern District of Illinois, Eastern Division, captioned *Jack J. Filbrun, Plaintiffs* vs. *The Chesapeake and Ohio Railway Company, a corporation, Defendant*, No. 61 C 1174. This complaint was substantially identical to that which had been filed in the Circuit Court of Cook County and dismissed. A copy of the complaint filed in the District Court for the Northern District of Illinois is attached to this petition as Exhibit G.

8. On August 23, 1961, petitioner moved that the case captioned *Jack J. Filbrun, Plaintiff* vs. *The Chesapeake and Ohio Railway Company, a corporation, Defendant*, No. 61 C 1174, be transferred to the United States District Court for the Western District of Michigan, Southern Division, sitting at Grand Rapids, Michigan. In support of its motion petitioner filed a written motion and affidavit which is attached to this petition as Exhibit H.

9. An affidavit in opposition to the motion to dismiss was duly filed by Filbrun, a copy of which is attached to this petition as Exhibit I.

10. In October, 1961, Case No. 61 C 1174 was transferred to the docket of the Honorable James B. Parsons, United States District Court, Northern District of Illinois, Eastern Division. At the request of petitioner he took the [fol. 5] motion to transfer under advisement on November 2, 1961.

11. On December 7, 1961, the Honorable James B. Parsons entered an order denying petitioner's motion to transfer. A copy of this order is attached to this petition as Exhibit J.

12. On February 9, 1962, petitioner filed a Petition, entitled "For Rehearing of Motion to Transfer and Motion to Vacate Order Denying Motion to Transfer", a copy of which is attached to this petition as Exhibit K. The ground for this Petition was that the United States District Court was required to give full faith and credit to the order of the Circuit Court of Cook County, Illinois, and therefore, was required to transfer this action upon motion of The Chesapeake and Ohio Railway Company.

13. On March 20, 1962, the Honorable James B. Parsons entered an order denying petitioner's motion to transfer on rehearing. A copy of this order is attached to this petition as Exhibit L.

14. The United States District Court for the Northern District of Illinois was, and is, an inconvenient forum for the trial of the case filed by Jack J. Filbrun against petitioner. Transfer of the case to the United States District Court for the Western District of Michigan, Southern Division, would be for the convenience of the parties and wit- [fol. 6] nesses and in the interest of justice for the following reasons:

(1) Filbrun is a resident of Ludington, Michigan, which is approximately 300 miles from Chicago, Illinois and approximately 60 miles from Grand Rapids, Michigan.

(2) The accident of which Filbrun complained occurred in Ludington, Michigan.

(3) The seven doctors and chiropractors who examined and treated Filbrun at the time of his alleged injury, and immediately thereafter, all reside in Michigan.

(4) A Dr. Rabin, who did not examine or treat Filbrun until after he had retained his present Chicago attorneys to represent him, is the only witness, medical or otherwise, who does not reside in Michigan.

(5) Three of the four occurrence witnesses and two railroad employees who inspected the boxcar from which Filbrun fell, all reside in Ludington, Michigan.

(6) Seven of the eight medical witnesses will not be available to testify personally in Chicago, Illinois.

(7) The Circuit Court of Cook County, Illinois has previously dismissed the same case between the same parties on the ground that Cook County, Illinois is an inconvenient and inappropriate place for the trial of this action.

In failing to transfer the case as requested, the Honorable James B. Parsons abused his discretion. In failing [fol. 7] to give full faith and credit to the judgment of the Circuit Court of Cook County, the Honorable James B. Parsons denied petitioner's rights under 28 U.S.C. §1738.

Wherefore, your petitioner, The Chesapeake and Ohio Railway Company, prays that a rule be entered requiring the Honorable James B. Parsons to show cause why a writ of mandamus should not issue directing him to transfer the cause entitled *Jack J. Filbrun, Plaintiff*, vs. *The Chesapeake and Ohio Railway Company, a corporation, Defendant*, No. 61 C 1174, to the United States District Court for the Western District of Michigan, Southern Division, Grand Rapids, Michigan.

The Chesapeake and Ohio Railway Company, Petitioner, By Robert A. Straub, General Claims Attorney.

Charles J. O'Laughlin, Holland C. Capper, Thompson, Raymond, Mayer & Jenner, 135 South LaSalle Street, Chicago 3, Illinois, RAndolph 6-0220, Attorneys for Petitioner.

[fol. 8] *Duly sworn to by Robert A. Straub, jurat omitted in printing.*

[fol. 9]

EXHIBIT A TO PETITION FOR MANDAMUS

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

No. 61 C 2214

JACK J. FILBRUN,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,

Defendant.

TRIAL BY JURY IS DEMANDED

COMPLAINT AT LAW

Now comes the plaintiff, JACK J. FILBRUN, by HENSLEE & HENSLEE, his attorneys, and for his complaint against the defendant, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation, says:

1. That the defendant, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, is a corporation; that under its charter defendant is empowered to operate a system of railroads through the States of Illinois and Michigan and other states as a common carrier of passengers and freight for hire; that one of the lines of railroad operated by said defendant extends into the City of Chicago, County of Cook and State of Illinois where said defendant maintains offices and agents upon whom service of process may be had.

2. That at the time of the accident and injury hereinafter complained of, plaintiff was employed by defendant as a brakeman; that a part of the duties assigned to and performed by plaintiff were in the furtherance of interstate commerce and directly, closely and substantially affected such commerce; that at the time of the accident hereinafter complained of, plaintiff and defendant were subject to an Act of Congress of April 22, 1908, 35 Stat. 64, Chapter 149, as amended, commonly known as the Federal Employers'

Liability Act, 45 U.S.C.A., Sections 51-60, and to an Act [fol. 10] of Congress of March 2, 1893, c. 196, 27 Stat. 531, as amended, commonly known as the Federal Safety Appliance and Equipment Act, 45 U.S.C.A., Sections 1-32.

3. That on or about the 15th day of July, 1960, at or about the hour of 8:15 P.M., plaintiff was on duty in the capacity of a brakeman in defendant's East Yard at or near Ludington, Michigan.

4. That at the said time and place plaintiff was acting as an employee of defendant within the course of his employment and in the furtherance of the business of defendant.

5. That it then and there became and was the duty of defendant to use ordinary care to provide the plaintiff with a reasonably safe place in which to do his work.

6. That at said time and place plaintiff attempted to release the hand brake on a box car; that said brake suddenly and violently released causing plaintiff to fall from the car and to sustain the injuries hereinafter more specifically set forth.

7. That defendant, at the time and place alleged, wholly disregarding its duty toward plaintiff was negligent or guilty of unlawful conduct in one or more of the following ways when defendant knew, or in the exercise of ordinary care should have known, that this, under the circumstances then and there existing, would be liable to injure plaintiff.

(a.) In hauling, or using, or permitting to be hauled along its line of railroad a car with an inefficient brake contrary to and in violation of the provisions of 45 U.S.C.A., Section 11.

(b.) In failing to use ordinary care to furnish the plaintiff with a reasonably safe place in which to work and safe instrumentalities with which to work.

8. That as a direct and proximate result of one or more of the foregoing acts of negligence, the plaintiff was caused to be so injured that divers bones of his body were dislocated and broken; that pre-existing and latent defects became patent and aggravated; that divers muscles,

[fol. 11] membranes, nerves and blood vessels of his body were displaced, bruised, torn, injured and their function impaired; that his brain and nervous system were greatly shocked and injured and their functions impaired; that he became sick, sore, lame and disordered from thence hitherto; that he suffered great pain and anguish by reason of his said injuries; that he necessarily incurred great liability and indebtedness endeavoring to be cured thereof, and in the future will expend further considerable sums of money in that endeavor; that plaintiff has been and at divers times hereafter will be unable to attend to his customary affairs and business; that by reason thereof he has lost and hereafter will lose large sums of money as it is reasonably certain that he will be disabled due to his injuries, at divers times in the future, the exact time being unknown to the plaintiff at the present time.

WHEREFORE, plaintiff prays judgment against defendant in the sum of EIGHTY-SEVEN THOUSAND ($87,000.00) DOLLARS.

HENSLEE & HENSLEE
139 N. Clark Street
Chicago 2, Illinois
STate 2-5925

Attorneys for Plaintiff

[fol. 12]

EXHIBIT B TO PETITION

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

No. 61 C 2214

JACK J. FILBRUN,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
a corporation,

Defendant.

NOTICE

To: HENSLEE & HENSLEE
139 North Clark Street
Chicago 2, Illinois
Attorneys for Plaintiff

PLEASE TAKE NOTICE that on Monday, April 17, 1961, at the hour of 9:30 A.M., or as soon thereafter as counsel may be heard, we shall appear before the Honorable Thomas E. Kluczynski, Judge of said Court, in Room 909 in the County Building, Cook County, Illinois, or before any other Judge as may be sitting in his place and stead, and shall move the Court for the entry of an order dismissing the complaint on the ground that the Circuit Court of Cook County, Illinois, is an inconvenient and inappropriate forum for the trial of the above entitled action. A copy of the motion, with attached affidavit, together with a draft order, is attached to this notice and hereby served upon you.

CHARLES J. O'LAUGHLIN
Attorney for Defendant

THOMPSON, RAYMOND, MAYER,
JENNER & BLOOMSTEIN
135 S. LaSalle Street
Chicago 3, Illinois
RAndolph 6-0220

[fol. 13]

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

No. 61 C 2214

JACK J. FILBRUN,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
a corporation,

Defendant.

MOTION TO DISMISS

Now comes defendant, The Chesapeake and Ohio Railway Company, by Thompson, Raymond, Mayer, Jenner & Bloomstein, and Charles J. O'Laughlin, its attorneys, and moves that the above entitled action be dismissed on the following grounds:

1. The Circuit Court of Cook County, Illinois, is an inconvenient and inappropriate forum for the trial of the above entitled action.

2. Plaintiff was at the time of his alleged injury, and is now, a resident of Ludington, Michigan.

3. Defendant, The Chesapeake and Ohio Railway Company, is a corporation, incorporated under the laws of the State of Virginia, and does business in the State of Michigan and other states.

4. Defendant is subject to the processes of the courts, both state and federal, located in the State of Michigan.

5. All the witnesses (with the exception of a retired Railway employee who has moved to Arizona) having knowledge concerning circumstances out of which the alleged cause of action arose, now reside in the State of Michigan. These are:

[fol. 14]

Robert Bourgette 5451 Johnson Road Ludington, Michigan	Vernon E. Vanderveer 910 Maple Street Ludington, Michigan
Rockwell C. Hayes 905 Maple Street Ludington, Michigan	Carl R. Johnson 5394 Howley Road Ludington, Michigan
Jack W. Geil 1035 Beechwood Drive Ludington, Michigan	Robert S. Genson 22 Tapago Boulevard Winslow, Arizona

All of the named witnesses (with the exception of Robert S. Genson) are essential to the proper presentation by defendant of its case and will be called by defendant to testify in this case. The substance of their expected testimony and its materiality to the alleged cause of action is set forth in the affidavit attached to this motion as Exhibit A and made a part hereof.

6. In addition, the physicians listed below have examined the plaintiff and have knowledge of his condition material to this case. Their attendance and in-court testimony is essential to the proper presentation by the defendant of its defense to the plaintiff's alleged cause of action. The substance of their expected testimony and its materiality to the alleged cause of action is set forth in Exhibit A.

Richard C. Boelkins, M. D. 125-127 Fountain Street N. E. Grand Rapids, Michigan	I. J. Iverson, Chiropractor 909 South Washington Avenue Ludington, Michigan

John R. Carney, M. D.
202 N. Park Street
Ludington, Michigan

D. P. Moore, M.D., Radiology
50 College S. E.
Grand Rapids 3, Michigan

E. T. Kruse, Chiropractor
388 First Street
Manistee, Michigan

F. W. Sutter, M.D.
Ludington,
Michigan

Robert R. Garnau, M.D. Radiology
Paulina Stearns Hospital
Ludington, Michigan

7. The witnesses named in paragraphs 5 and 6 above would be called by defendant to testify in a convenient forum in Michigan. However, since the processes of the Circuit Court of Illinois cannot be utilized to compel their attendance in an Illinois forum, the below named witnesses [fol. 15] have indicated by Exhibit A their refusal or inability to testify concerning the facts of this case should it be tried in the Circuit Court of Cook County:

Richard C. Boelkins, M. D.

John R. Carney, M.D.

E. T. Kruse, Chiropractor

I. J. Iverson, Chiropractor

D. P. Moore, M.D.

F. W. Sutter, M.D.

Robert R. Garnau, M.D.

8. Although the attendance of the other employee witnesses named in paragraph 5 above can be procured by defendant should the trial of this action take place in the Circuit Court of Cook County, such trial will require their attendance at a place more than 300 miles from their places of work and their homes for periods from one to three days each. In addition to the cost of transporting these witnesses to Illinois, during their absences, defendant will be required to assign other persons, most of whom will not be

equally familiar with the performance of their duties to perform the duties of the respective witnesses. Defendant will be required to pay the regular wages of the witnesses while absent from their work as well as the wages of the persons substituting for them, in addition to the traveling and hotel expenses of the witness.

9. The testimony of these witnesses which have indicated by Exhibit A their refusal to attend trial in an Illinois forum, will have to be presented to the Court and jury through the use of deposition evidence. Depositions are not satisfactory means of presenting testimony to a jury. Accordingly, trial in Illinois will seriously handicap defendant's presentation of its defense.

10. There are competent and regularly functioning state courts in Ludington, Michigan, the county seat of Mason [fol. 16] County, and at other county seats in the State of Michigan, and there is a competent and regularly functioning federal district court sitting at Grand Rapids, Michigan, which is approximately 60 miles away from the place of plaintiff's employment and home. The procedural laws in force in the state courts of Michigan as well as in the federal courts located there, provide a full and complete opportunity to litigants in those courts to present the type of issues involved in the complaint herein.

11. The crowded dockets of this Court preclude an early trial. Michigan courts are less congested and a trial within one year may be expected. Defendant may be prejudiced by delay since some of the employee witnesses may retire and move to distant locations before this cause can be tried by this Court.

12. The three year statute of limitations does not expire until July 15, 1963. Plaintiff would in no way be prejudiced by dismissal of this action.

13. For the above reasons, the plaintiff's selection of an Illinois state forum is motivated by vexation and harassment. There is no connection with Illinois and the occurrence out of which the purported cause of action arose.

On the objective facts it is apparent that the intention of plaintiff was to import his purported cause of action into a forum where he anticipates a more generous reward.

WHEREUPON, defendant, The Chesapeake and Ohio Railway Company, moves that the plaintiff's complaint be dismissed.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

By: .....

.....

Its Attorneys

THOMPSON, RAYMOND, MAYER,
JENNER & BLOOMSTEIN
135 South LaSalle Street
Chicago 3, Illinois
RAndolph 6-0220

[fol. 17]

EXHIBIT A TO MOTION TO DISMISS

AFFIDAVIT OF W. HAROLD WALLACE
DISTRICT CLAIM AGENT

STATE OF MICHIGAN)
COUNTY OF SAGINAW)

W. Harold Wallace, being duly sworn, deposes and says that he resides at Saginaw, Michigan; that for the past 38 years he has been in the employ of The Chesapeake and Ohio Railway Company; and that for the last 33 years he has held the position of District Claim Agent with that company.

Affiant has caused to be interviewed the persons below listed, who constitute all of the persons to his knowledge having knowledge concerning the injury suffered by Jack J. Filbrun at Ludington, Michigan, on July 15, 1960. Affiant believes that the in-court testimony of these witnesses is essential to the proper presentation by defendant of its defense to Mr. Filbrun's purported cause of action. The

names and addresses of the witnesses, together with the substance of their expected testimony are:

(1) Robert Bourgette
5451 Johnson Road
Ludington, Michigan

Mr. Bourgette is expected to testify that on July 15, 1960, he reported for duty at Ludington, Michigan, as conductor with engine 5224 to perform switching operations in the Ludington, Michigan area. He witnessed the incident whereby switchman, Jack J. Filbrun, fell from a boxcar brake platform. He was directly below Filbrun and broke his fall by catching him. He inspected the condition of the hand brake which Filbrun was releasing when he fell, along with the condition of all equipment attendant thereto. All equipment was in perfect working order. He noticed nothing wrong with the brake platform, ladder, sill steps or any [fol. 18] other part of the car when he went up to place the brake on the car soon after the accident occurred. All items of equipment mentioned above were free of all grease, oil, foreign objects and substances and were securely fastened and properly located and in good condition and repair.

(2) Vernon E. Vanderveer
910 Maple Street
Ludington, Michigan

Mr. Vanderveer is expected to testify that on the morning of July 16, 1960, he made an inspection along with assistant car foreman, Rockwell Hayes of the boxcar from which Filbrun fell (C.N. 521723). He found that the ladders, grab irons, sill steps, brake platform, brake wheel, and hand holds were all securely fastened, properly located and free from grease, oil or foreign objects and substances and in good condition and repair with no exceptions. He made a working test of the hand brake by tightening it and releasing it and found that it worked properly and was in good condition and repair.

(3) Rockwell C. Hayes
905 Maple Street
Ludington, Michigan

Mr. Hayes is expected to testify that he inspected the box-car involved in the accident (C.N. 521723) at Ludington, Michigan, on the morning of July 16, 1960. He made a working test of the brake by tightening it and releasing it and found the brake to be in good working condition. He found that the car involved was in good condition and repair and the grab irons, hand holds, and brake platform and the brake wheel and ladders were all in good condition and repair, securely fastened and properly located and all were free of grease, oil and all other foreign objects and substances.

(4) Carl R. Johnson
5394 Howley Road
Ludington, Michigan

[fol. 19] Mr. Johnson is expected to testify that he is an employee of The Chesapeake and Ohio Railway Company as a locomotive engineer and has been in its service for the past 31 years. On July 15, 1960, at about 8:15 P.M., the weather was clear, the ground was dry and there was good visibility. When switchman Jack Filbrun fell, the train was standing still on track No. 1, at Ludington, Michigan. It was necessary to release the hand brake because the engine almost stalled when Johnson attempted to pull the cars. Johnson was operating the engine from the North side and Filbrun got down from the engine on that side to let brakes off the train. Filbrun climbed up the leading end of the box-car which was next to the engine. He saw Filbrun fall. He saw conductor Bourgette break Filbrun's fall. He looked the car over and found everything in place and could see nothing wrong with the car and did not notice any grease, oil, or foreign objects or substances on the car. Nothing was loose on the car. He has known Mr. Filbrun since he was about 14 years old and has worked the same job as Filbrun many times before the fall.

(5) Jack W. Geil
1035 Beechwood Drive
Ludington, Michigan

Mr. Geil is expected to testify that he was a switchman working at Ludington, Michigan, on July 15, 1960, with the same train crew as Jack Filbrun. He was about four cars east of where the accident occurred. His first knowledge of the accident was when he got down onto the ground, looked to the west and saw Filbrun lying on the ground. He found Filbrun conscious when he arrived. Filbrun was lying across the north rail of the track, track No. 1, the track the train was on, with his head to the north. The conductor, engineer and fireman were with him at the time. He saw the ambulance arrive shortly following the accident and Filbrun was taken from the scene. Filbrun did not blame his fall on faulty equipment.

[fol. 20] (6) Robert S. Genson
22 Tapago Boulevard
Winslow, Arizona

Mr. Genson did not witness the accident and since his testimony would be cumulative, he will not be called by the defendant to testify.

Affiant has caused the employee witnesses identified above to be questioned concerning their willingness to go to Chicago, Illinois, for the purpose of testifying in this matter. They would go only if the Company ordered them to do so, paid all their transportation expenses plus other expenses while in Chicago, plus full pay for all time spent on such a trip.

In addition to the employee witnesses, affiant has interviewed or received written reports from the following named physicians and chiropractors. Affiant believes that the in-court testimony of these witnesses is essential to the proper presentation by defendant of its defense to Mr. Filbrun's purported cause of action. The names and addresses of the physicians and chiropractors, together with the substance of their expected testimony are:

(1) Richard C. Boelkins, M.D.
125-127 Fountain Street N.E.
Grand Rapids, Michigan

Dr. Boelkins is expected to testify that he is a physician specializing in industrial medicine; that on October 18, 1960, and November 12, 1960, he saw Jack J. Filbrun professionally and treated him for alleged injuries arising out of an accident which occurred on July 15, 1960 at Ludington, Michigan. He took a medical history, examined Mr. Filbrun's back, ordered x-rays of the cervical and dorsal spine. The x-rays revealed no significant findings. In Dr. Boelkin's opinion, Filbrun had no signs of any injury.

Dr. Boelkin states that he would be unable to leave his practice for the time required to testify in Chicago. He states, however, that he would be able to testify concerning this matter in Grand Rapids or Ludington, Michigan.

[fol. 21] (2) I. J. Iverson, Chiropractor
909 South Washington Avenue
Ludington, Michigan

Dr. Iverson is expected to testify that he saw Filbrun professionally on September 24, 26, 29, October 20 and November 7, 1960. Filbrun explained that he had fallen from a flat-car in July, 1960. Dr. Iverson could find nothing specific except some muscular tension. He recommended that Filbrun seek psychiatric help.

Dr. Iverson would be unable to leave his practice in Ludington, Michigan for the time required to testify in Chicago. He would be willing to testify concerning this matter in Ludington or Grand Rapids, Michigan.

(3) John R. Carney, M.D.
202 N. Park Street
Ludington, Michigan

Dr. Carney is expected to testify that he saw Filbrun on August 8, 1960, again late in August, 1960, on September 13, 1960, and also about one week later. Filbrun complained of pain in the left flank and pyuria. He was given azogantrisin with prompt clearing of the infection. In Sep-

tember 13, 1960, and approximately a week later, Filbrun had a reoccurrence of the pyuria and again had a left pyeloneaphritis. He was given furadantin. The next week the urine was clear again, but he still complained of pain. An IVP was done and it was negative.

Dr. Carney would be unable to leave his practice for the time required to testify in Chicago. He indicates that he would be available to testify concerning this matter in a court in Grand Rapids or Ludington.

(4) D. P. Moor M.D.
Radiology
50 College S. E.
Grand Rapids 3, Michigan

[fol. 22] Dr. Moore is expected to testify that on November 12, 1960, at the reference of Dr. Boelkins, he examined x-rays of the cervical and dorsal spine region of Jack Filbrun. No evidence of osseous injury to the spine was observed. The intervertebral disc spaces were maintained. There was no abnormality in the upper dorsal or cervical spine, and none in the lower dorsal spine except for some mild hypertrophic lipping.

Dr. Moore states he would be unable to leave his practice for the time required to testify in Chicago. He states that he would be able to testify concerning this matter in Grand Rapids or Ludington, Michigan.

(5) E. T. Kruse, Chiropractor
388 First Street
Manistee, Michigan

Dr. Kruse is expected to testify that he saw Filbrun on November 21, 28 and December 5, 1960. Filbrun complained of lower back pain and an examination revealed a lumbo sacral strain which was a routine condition. The condition responded satisfactorily and appeared corrected.

Dr. Kruse states that he would be unable to leave his practice for the time required to testify in Chicago. He states that he would be willing to testify concerning this matter in a court in Ludington or Grand Rapids, Michigan.

(6) Dr. F. W. Sutter, M.D.
Ludington,
Michigan

Dr. Sutter is expected to testify that he saw Mr. Filbrun on several different dates following his injury on July 15, 1960. In his opinion Filbrun suffered back muscle bruising and strain and was released to return to work on August 31, 1960.

Dr. Sutter would be unable to leave his practice for the time required to testify in Chicago. He states that he would [fol. 23] be willing to testify concerning this matter in a court in Ludington or Grand Rapids, Michigan.

(7) Robert R. Garnau, M.D. Radiology
Paulina Stearns Hospital
Ludington, Michigan

Dr. Garnau is expected to testify that on September 20, 1960, at the request of Dr. J. Carney, he performed an x-ray examination of the abdomen of Jack Filbrun. No calculi were noted in the region of the urinary collecting systems to suggest a renal or ureteral calculi. The soft tissue shadows of the psoas muscles and kidney outlines were not abnormal. No abnormalities of the boney structures were noted. The test was negative.

Dr. Garnau would be unable to leave his practice for the time required to testify in Chicago. He states that he would be willing to testify concerning this matter in a court in Ludington or Grand Rapids, Michigan.

/s/ W. Harold Wallace

Subscribed & sworn to before me,
a Notary Public authorized to take
oaths in the State of Michigan,
this 7th day of April, 1961.

/s/ Arthur Beyer
Notary Public

My commission expires:

[fol. 24]

EXHIBIT C TO PETITION FOR MANDAMUS

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

No. 61 C 2214

JACK J. FILBRUN,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,

Defendant.

ANSWER TO MOTION TO DISMISS

Now comes the plaintiff, JACK J. FILBURN, by HENSLEE & HENSLEE, his attorneys, and in answer to the material allegations in the Motion To Dismiss heretofore filed by the defendant, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation says:

1. Plaintiff denies that this court is either an inconvenient or an inappropriate forum for the trial of the instant cause.

2. Plaintiff admits that he was and is a resident of Ludington, Michigan.

3. Plaintiff admits that THE CHEASAPEAKE AND OHIO RAILWAY COMPANY is a corporation, incorporated under the laws of the State of Virginia and that said defendant does business in Michigan and other states; plaintiff further avers on information and belief that defendant does a substantial volume of railroad business in the carriage of passengers and freight for hire to and from Chicago, Illinois, and maintains many executive offices in Chicago for the handling of its business including the positions of Freight Traffic Manager, Assistant Freight Traffic Manager, Manager and Assistant Manager, World Commerce, General Coal Traffic Agent, Assistant Coal Traffic Agent, Terminal

Superintendent, General Agent—Passenger Department and Western Passenger Agent.

[fol. 25] 4. Plaintiff admits that defendant is subject to process issued by at least some of the State and Federal Courts located in Michigan.

5. Plaintiff is without knowledge sufficient to form a belief as to the present address of defendant's employees and former employee named in paragraph 5; plaintiff denies that all of the five named witnesses are essential to the proper presentation of defense of its case.

6. Plaintiff admits that Drs. Boelkins, Carney and Sutter and the two chiropractors named in paragraph 6 had occasion to examine the plaintiff; plaintiff denies that the attendance and "in court" testimony of said witnesses is essential to the defense of the case.

7. Plaintiff is without knowledge sufficient to form a belief as to the truth of the allegations in paragraph 7; plaintiff avers on information and belief that said medical doctors either have been compensated by defendant corporation or have submitted bills to defendant corporation for said services or hereafter will submit such bills to defendant.

8. Plaintiff admits that the attendance of defendant's employees at a trial in this forum would necessitate their absence from their home for a minimum of one day; plaintiff is without information sufficient to form a belief as to the allegations that said employees would necessarily be absent from their assigned duties.

9. Plaintiff denies the allegations of paragraph 9.

10. Plaintiff admits that there are courts in Ludington, Michigan and at Grand Rapids, Michigan; plaintiff avers that the attorney handling this case in behalf of plaintiff is not admitted to practice in said courts, and plaintiff is without knowledge as to the practice or "regular functioning" of said courts in which defendant prefers to try this case.

11. Plaintiff is without information sufficient to form a belief as to the allegation of expeditious trials in said Michi-

gan courts; plaintiff denies that defendant will be prejudiced by trial of this cause in this forum.

[fol. 26] 12. Plaintiff denies the allegation that it would not be prejudiced by dismissal of this cause.

13. Plaintiff denies that its selection of this forum was motivated by vexation or harassment; plaintiff denies the allegation that there is no connection between Illinois and this cause of action; plaintiff denies that this cause of action was imported and avers that the suit was properly filed in this forum.

14. That the Congress of the United States, pursuant to the terms of the Federal Employers' Liability Act, has given to the plaintiff (and not to the defendant) the benefit of selecting the forum in which to have his cause of action tried.

15. That plaintiff expects to present the evidence of all eye witnesses to the accident giving rise to the instant suit.

16. That plaintiff on two occasions has been hospitalized in Chicago, Illinois; that surgery was performed on plaintiff in Chicago by G. J. Rabin, M. D.; that the major medical and surgical care for the injuries sustained by plaintiff has been rendered in Chicago, Illinois.

17. That the affidavit of defendant's claim agent affords no basis for concluding that the doctors named therein would not be able to attend trial in Chicago if, in fact, the defendant so desired their personal appearance in Court; that the testimony of said doctors can be satisfactorily presented in deposition form if said testimony indeed is at all necessary in view of the subsequent treatments and surgery rendered in Chicago.

18. That there is no factual showing in defendant's motion or supporting affidavit that plaintiff's choice of this forum was a purely vexatious effort by plaintiff to harass the defendant.

[fol. 27] 19. That there is no factual showing in defendant's motion or supporting affidavit as to the additional expense, if any, that defendant would incur if the instant

cause should be tried in Chicago rather than in the courts so clearly the choice of the defendant.

20. That there is no factual showing in defendant's motion or supporting affidavit that the evidence, if any, to be produced by defendant could not adequately be submitted by deposition.

And in support of this Answer to Motion to Dismiss the plaintiff files the attached affidavit of KEITH E. ROBERTS.

/s/ HENSLEE & HENSLEE
HENSLEE & HENSLEE,
139 N. Clark Street
Suite 810
Chicago 2, Illinois
STate 2-5925

Attorneys for Plaintiff

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

Shirley Kortendick, being first duly sworn, on oath deposes and says that a copy of Answer to Motion to Dismiss and supporting Affidavit were served upon defendant by placing same in an envelope, with proper postage affixed thereto, addressed to Thompson, Raymond, Mayer, Jenner and Bloomstein, 135 S. La Salle Street, Chicago 3, Illinois and placing said envelope in the U. S. Mail Chute at 139 North Clark Street, Chicago 2, Illinois on the 18th day of April, 1961.

/s/ SHIRLEY KORTENDICK

SUBSCRIBED and SWORN to
before me this 19th day of
April, 1961.

/s/ FRANK PETRO
Notary Public

[fol. 28]

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

No. 61 C 2214

JACK J. FILBRUN,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,

Defendant.

AFFIDAVIT

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

KEITH E. ROBERTS, being first duly sworn, on oath deposes and says:

1. That affiant is a member of the law firm of HENSLEE & HENSLEE; that said affiant is handling the instant cause on behalf of plaintiff; that affiant makes this affidavit in opposition to the motion of defendant heretofore filed in this cause to dismiss the above-entitled cause of action.

2. That defendant is a foreign corporation, and is a corporation authorized to transact business in the State of Illinois as a common carrier by railroad; that said defendant performs a substantial business in the carriage of passengers and freight for hire to and from Chicago, Illinois.

3. That a reasonable estimate of the time required for trial of this cause would be from two to three days.

4. That it is plaintiff's intention to present at the trial the testimony of all occurrence witnesses.

5. That plaintiff on two occasions was hospitalized in Chicago for treatment of the injuries sustained in the acci-

dent giving rise to the instant suit; that surgery was performed on plaintiff by G. J. Rabin, M. D., in Chicago; that plaintiff will present testimony at the trial pertaining to [fol. 29] said hospitalization and surgery.

6. That on information and belief defendant maintains a number of executive offices in Chicago including, but not limited to those occupied by its Freight Traffic Manager, Assistant Freight Traffic Manager, Manager and Assistant Manager, World Commerce, General Coal Traffic Agent, Assistant Coal Traffic Agent, Terminal Superintendant, General Agent—Passenger Department and Western Passenger Agent.

7. That affiant is not licensed to practice in any of the courts in which defendant prefers to try this case.

/s/ KEITH E. ROBERTS

SUBSCRIBED and SWORN
to before me this 19 day
of April, 1961.

/s/ FRANK PETRO
Notary Public

[fol. 30]

EXHIBIT D TO PETITION FOR MANDAMUS

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

No. 61 C 2214

JACK J. FILBRUN,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,

Defendant.

ORDER

This cause coming on to be heard on the motion of The Chesapeake and Ohio Railway Company for the dismissal of the above entitled action, on the ground that the Circuit Court of Cook County, Illinois, is an inconvenient and inappropriate forum,

IT IS HEREBY ORDERED that the action be and the same is hereby dismissed.

ENTER:

/s/ KLUCZYNSKI
Judge

DATED: May 15, 1961

[fol. 31]

EXHIBIT E TO PETITION FOR MANDAMUS

STATE OF ILLINOIS,
COUNTY OF COOK, ss.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Motion Number .....

General Number 61 C 2214

JACK J. FILBRUN,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
a corporation,

NOTICE

To Thompson, Raymond, Mayer,
Jenner and Bloomstein
Attorney for Defendant
135 S. La Salle Street,
Chicago 3, Illinois

Please take notice that on the 26th day of May A. D. 1961 at 9:30 A.M., or as soon thereafter as this motion may be heard, we shall appear before his honor, Judge Thomas E. Kluczynski in the room usually occupied by him as a courtroom in the Courthouse, No. 100 to 148 North Clark Street, in the City of Chicago, or, in his absence, before any other judge, who may be sitting in his place and stead, and then and there

~~(a) present the motion of the undersigned that~~

(b) present a petition, a copy of which is herewith served upon you, for rehearing of Motion to Dismiss and Motion to Vacate Order Dismissing Case.

at which time and place you may appear if you so desire.

HENSLEE & HENSLEE
Attorney for Plaintiff
Address 139 N. Clark Street, Suite 810,
Chicago 2, Illinois
Telephone STate 2-5925

[fol. 32]

STATE OF ILLINOIS,
COUNTY OF COOK, ss.

Shirley Kortendick being first duly sworn, deposes and says that she served the within notice and petition therein referred to upon Thompson, Raymond, Mayer, Jenner and Bloomstein, 135 S. La Salle Street, Chicago 3, Illinois by placing copy of the same to said attorneys in the U. S. Mail Chute at 139 N. Clark Street, Chicago 2, Illinois on the 16 day of May A. D. 1961 at 5:00 o'clock P.M.

That the above named parties are all the parties that have filed appearances and have not heretofore been found by the Court to be in default for failure to plead.

/s/ SHIRLEY KORTENDICK

Subscribed and sworn to before
me this 16th day of May, A. D. 1961

/s/ FRANK PETRO
Notary Public

[fol. 33]

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

No. 61 C 2214

JACK J. FILBRUN,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,

Defendant.

PETITION FOR REHEARING OF MOTION TO DISMISS AND MOTION TO VACATE ORDER DISMISSING CAUSE

Now comes the plaintiff, JACK J. FILBRUN, by HENSLEE & HENSLEE, his attorneys, and petitions this Court for a rehearing of the Motion to Dismiss this cause which was granted on May 15, 1961, and files this its Motion to Vacate the Order Dismissing This Cause, and, in support of its petition and motion says:

1. That the requirements of justice demand that this cause be tried in this forum in accordance with the federal right to a choice of venue granted the plaintiff by the Federal Employers Liability Act.

2. That there is no evidence that the plaintiff's choice of forum was, is, or could be vexatious.

3. That the demands of substantial justice require that plaintiff be permitted to try this case in the jurisdiction in which he has received primary and substantial medical and surgical attention.

And in support of this petition the plaintiff files the attached Affidavit of KEITH E. ROBERTS.

/s/ HENSLEE & HENSLEE
HENSLEE & HENSLEE
139 N. Clark Street,
Suite 810,
Chicago 2, Illinois
Attorneys for Plaintiff

[fol. 34]

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

No. 61 C 2214

JACK J. FILBRUN,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,

Defendant.

AFFIDAVIT

KEITH E. ROBERTS, being first duly sworn, on oath deposes and says:

1. That affiant is a member of the law firm of HENSLEE & HENSLEE and is handling the instant cause on behalf of plaintiff. That acting in said capacity affiant has reviewed his investigative and medical file and on that basis submits this affidavit.

2. That following his accident and injury on July 15, 1960, plaintiff was examined by a succession of doctors, most of whom were selected by and/or compensated by defendant, that said doctors advised plaintiff that they could find nothing seriously wrong with him; that the character of the treatment rendered is typified by the letter to plaintiff from Richard C. Boelkins, M. D. annexed hereto as Exhibit A, which necessitated the seeking by plaintiff of non-railroad associated or sponsored medical care.

3. That on or about December 20, 1960, plaintiff came to the office of affiant seeking legal advice and competent medical care from an orthopedic specialist not affiliated or associated with a railroad company.

4. That on or about December 20, 1960, affiant arranged for an examination of plaintiff by a competent orthopedic specialist, G. J. Rabin, in Chicago. That as a result of

that examination Dr. Rabin concluded and would so testify that plaintiff sustained a serious injury to the neck and [fol. 35] lower back and recommended that plaintiff be hospitalized for conservative treatment.

5. That on January 17, 1961 plaintiff was admitted to Alexian Brothers Hospital in Chicago with acute pain in the neck with radiating pain and symptomatology down the left upper extremity and acute pain in the low back radiating down the lower extremities, that during said period of hospitalization plaintiff was placed in cervical and pelvic traction and was given an intensive course of physiotherapy and anti-spasmodic medication; that on or about February 3, 1961 plaintiff was discharged from said hospital.

6. That on February 17, 1961, plaintiff was readmitted to Alexian Brothers Hospital where a myelographic study was performed revealing a ruptured intervertebral defect; that on February 23, 1961, a laminectomy and spinal fusion was performed by G. J. Rabin, M.D., at which time a large ruptured intervertebral disc between L-5 and S-1, which was causing compression of the spinal cord, was removed; that plaintiff was fitted with a torso spica cast and discharged from the hospital on March 3, 1961.

7. That in the trial of this cause the doctor most competent to testify concerning the myelographic study and surgery performed upon plaintiff is G. J. Rabin, M.D.; that to induce said doctor to appear in Ludington or Grand Rapids, or elsewhere in Michigan, would require an expenditure by plaintiff of a minimum of $1,000.00; that arrangements can be made to have Dr. Rabin testify in this court without causing him to forego any of the surgery customarily performed by said doctor five or six days per week.

8. That should defendant make any issue as to the condition, care or treatment of plaintiff, it would be necessary for plaintiff to produce as witnesses the roentgenologist, assisting surgeon, nurses, anesthetist and therapists [fol. 36] at Alexian Brothers Hospital who assisted in the care and treatment of plaintiff; that said witnesses, five

or more in number, could much more readily, more conveniently and less expensively be produced in Chicago than in a foreign jurisdiction; that the estimated cost to the plaintiff of producing said witnesses in a foreign jurisdiction would be approximately $1,500.00.

9. That to date plaintiff has incurred medical expenses in Chicago in the amount of $1,425.00 and hospital expenses in Chicago in the amount of $1,066.60; that plaintiff is now and hereafter will continue to be under the care of Dr. Rabin for a period of many months.

10. That to relieve defendant of any unnecessary expense plaintiff will produce the testimony of all occurrence witnesses in Chicago at plaintiff's expense.

/s/ KEITH E. ROBERTS
KEITH E. ROBERTS

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

SUBSCRIBED and SWORN
to before me this 16 day
of May, 1961.

/s/ FRANK PETRO
Notary Public

[fol. 37]

EXHIBIT "A" TO PETITION

TELEPHONE 5-8622

RICHARD C. BOELKINS, M. D.

125-127 FOUNTAIN ST., N. E.

GRAND RAPIDS 3, MICHIGAN

November 16, 1960.

Mr. Jack J. Filbrun
414 N. Lewis St.
Ludington, Michigan.

Dear Jack:

Just a note to inform you that X-rays of your neck and back taken by Dr. Fellows and Moore on November 12, 1960 were completely negative for injury to the bones or joint spaces.

I am sorry to learn that you still had symptoms. Let me assure you that there is no evidence of any disease or injury to cause you anxiety. Therefore I know that working will not be harmful to you.

I hope you will find it possible to relax once in a while. A good hot soak in the tub and a couple aspirin will give relief to most muscular aches. Gradually I believe you will completely recover.

If I can be of any further help to you please feel free to call on me.

Sincerely

/s/ R. C. BOELKINS
Richard C. Boelkins M.D.

R.C.B./R.S.

[fol. 38]

EXHIBIT F TO PETITION FOR MANDAMUS

CIRCUIT COURT OF COOK COUNTY, ILLINOIS

General No. 61C2214

JACK J. FILBRUN

vs.

THE CHESAPEAKE & OHIO RAILWAY

This cause coming on to be heard on the plaintiff's petition for rehearing of motion to dismiss and motion to vacate order dismissing cause and the Court having considered the affidavit of Keith E. Roberts under date of May 16, 1961 and the affidavits heretofore filed by plaintiff and defendant, and having heard the arguments of counsel,

It is hereby ordered: that the Petition for Rehearing of motion to dismiss and the motion to vacate order dismissing cause be and the same are hereby denied.

Enter

.....

Judge

Jun 8, 1961

[fol. 39]

EXHIBIT G TO PETITION FOR MANDAMUS

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

Civil Action File No. 61 C 1174

JACK J. FILBRUN,

Plaintiff,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,

Defendant.

SUMMONS

To the above named Defendant:

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

You are hereby summoned and required to serve upon HENSLEE & HENSLEE plaintiff's attorney, whose address 139 North Clark Street, Chicago 2, Illinois, STate 2-5925 an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

ROY H. JOHNSON
Clerk of Court.

MARGUERITE GILMOUR
Deputy Clerk.

Date: July 11, 1961

[Seal of Court]

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 40]

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DISTRICT

No. 61C1174

JACK J. FILBRUN

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
a corporation

SUMMONS IN CIVIL ACTION

Returnable not later than 20 days after service.

HENSLEE & HENSLEE
139 North Clark St. Suite 810
Chicago 2, Illinois
STate 2-5925
Attorney for Plaintiff.

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the day of 19 , I received this summons and served it together with the complaint herein as follows:

.....
United States Marshal.

By.....
Deputy United States Marshal.

MARSHAL'S FEES
Travel..... $.....
Service ....

Subscribed and sworn to before me, a this day of , 19 .

.....

[SEAL]

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his Deputy.

[fol. 41]

EXHIBIT G TO PETITION FOR MANDAMUS

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

TRIAL BY JURY DEMANDED

JACK J. FILBRUN,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,

Defendant.

COMPLAINT AT LAW

Now comes the plaintiff, JACK J. FILBRUN, by HENSLEE & HENSLEE, his attorneys, and for his complaint against the defendant, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation, says:

1. That the defendant, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, is a corporation; that under its charter defendant is empowered to operate a railroad system through the States of Illinois and Michigan and other states as a common carrier of passengers and freight for hire; that said defendant is doing business within the jurisdiction of this court, and that one of the lines of railroad operated by said defendant extends into the City of Chicago, County of Cook and State of Illinois where said defendant maintains offices and agents upon whom service of process may be had.

[fol. 42] 2. That at the time of the accident and injury hereinafter complained of, plaintiff was employed by defendant as a brakeman; that a part of the duties assigned to and performed by plaintiff were in the furtherance of

interstate commerce and directly, closely and substantially affected such commerce; that at the time of the accident hereinafter complained of, plaintiff and defendant were subject to an Act of Congress of April 22, 1908, 35 Stat. 64, Chapter 149, as amended, commonly known as the Federal Employers' Liability Act, 45 U.S.C.A., Sections 51-60, and to an Act of Congress of March 2, 1893, c. 196, 27 Stat. 531, as amended, commonly known as the Federal Safety Appliance and Equipment Act, 45 U.S.C.A., Sections 1-32.

3. That on or about the 15th day of July, 1960, at or about the hour of 8:15 P.M., plaintiff was on duty in the capacity of a brakeman in defendant's East Yard at or near Ludington, Michigan.

4. That at the said time and place plaintiff was acting as an employee of defendant within the course of his employment and in the furtherance of the business of defendant.

5. That it then and there became and was the duty of defendant to use ordinary care to provide the plaintiff with a reasonably safe place in which to do his work.

[fol. 43] 6. That at said time and place plaintiff attempted to release the hand brake on a box car; that said brake suddenly and violently released causing plaintiff to fall from the car and to sustain the injuries hereinafter more specifically set forth.

7. That defendant, at the time and place alleged, wholly disregarding its duty toward plaintiff was negligent or guilty of unlawful conduct in one or more of the following ways when defendant knew, or in the exercise of ordinary care should have known, that this, under the circumstances then and there existing, would be liable to injure plaintiff:

(a) In hauling, or using, or permitting to be hauled along its line of railroad a car with an inefficient brake contrary to and in violation of the provisions of 45 U.S. C.A., Section 11.

(b) In failing to use ordinary care to furnish the plaintiff with a reasonably safe place in which to work and safe instrumentalities with which to work.

8. That as a direct and proximate result of one or more of the foregoing unlawful or negligent acts or omissions, the plaintiff was caused to be so injured that pre-existing and latent defects became patent and aggravated; that divers muscles, membranes, nerves and blood vessels of his body were displaced, bruised, torn, injured and their [fol. 44] functions impaired; that his brain and nervous system were greatly shocked and injured and that he sustained a brain concussion; that he sustained a rupture of one or more interverbral discs, that he became sick, sore, lame and disordered from thence hitherto; that he suffered great pain and anguish by reason of his said injuries; that he necessarily incurred great liability and indebtedness for medical attention, hospitalization and surgery endeavoring to be cured thereof, and in the future will expend further considerable sums of money in that endeavor; that plaintiff has been and at divers times hereafter will be unable to attend to his customary affairs and business; that by reason thereof he has lost and hereafter will lose large sums of money as it is reasonably certain that he will be disabled due to his injuries at divers times in the future, the exact time being unknown to the plaintiff at the present time.

WHEREFORE, plaintiff prays judgment against defendant in the sum of ONE HUNDRED AND EIGHTY-FIVE THOUSAND ($185,000.00) DOLLARS.

HENSLEE & HENSLEE
139 North Clark Street
Chicago 2, Illinois
STate 2-5925

Attorneys for Plaintiff

[fol. 45]

EXHIBIT H TO PETITION FOR MANDAMUS

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

No. 61 C 1174

JACK J. FILBRUN,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,

Defendant.

NOTICE

To: HENSLEE & HENSLEE
139 North Clark Street
Chicago 2, Illinois
Attorneys for Plaintiff

PLEASE TAKE NOTICE that on Wednesday, August 23, 1961, at 10:00 A.M. or as soon thereafter as counsel may be heard, we shall appear before the Honorable Julius Hoffman, in the room usually occupied by him as a courtroom in the Federal Building, Chicago, Illinois, or before any other judge who may be sitting in his place and stead, and present to the Court a motion to transfer this cause and to set a date certain for the hearing of the motion.

A copy of the motion with attached exhibits is appended to this notice and hereby served upon you.

CHARLES J. O'LAUGHLIN
Attorney for Defendant

Thompson, Raymond, Mayer,
Jenner & Bloomstein
135 South LaSalle Street
Chicago 3, Illinois
RAndolph 6-0220

[fol. 46]

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

....., being first duly sworn, on oath deposes and says that she served the foregoing notice, together with a copy of the motion with attached exhibits therein referred to, on the attorneys named therein, by depositing copies of the same in the United States mail chute at 135 South LaSalle Street, Chicago, Illinois, enclosed in an envelope addressed to said attorneys, with postage fully prepaid thereon, on the ..... day of ....., 1961.

.....

Subscribed and sworn to
before me this ..... day of
....., 1961.

.....
Notary Public

[fol. 47]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

No. 61 C 1174

JACK J. FILBRUN,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,

Defendant.

MOTION TO TRANSFER

Now comes defendant, The Chesapeake and Ohio Railway Company, by Thompson, Raymond, Mayer, Jenner & Bloomstein, and Charles J. O'Laughlin, its attorneys, and pursuant to Section 1404(a) of the Judicial Code, 28 U.S.C. §1404(a), moves that the above entitled action be transferred to the United States District Court for the Western District of Michigan, Southern Division, sitting at Grand Rapids, Michigan, on the following grounds:

1. Plaintiff was at the time of his alleged accident, and is now, a resident of Ludington, Michigan, which is approximately sixty miles from Grand Rapids, Michigan.

2. Defendant, The Chesapeake and Ohio Railway Company, is a corporation, incorporated under the laws of the State of Virginia, and does business in the State of [fol. 48] Michigan and other states.

3. Defendant is subject to the processes of the courts, both State and Federal, located in the State of Michigan.

4. All of the witnesses (with the exception of a retired railway employee who has moved to Arizona) having knowledge concerning circumstances out of which the alleged

cause of action arose, now reside in and around Ludington, Michigan. These are:

Robert Bourgette 5451 Johnson Road Ludington, Michigan	Vernon E. Vanderveer 910 Maple Street Ludington, Michigan
Rockwell C. Hayes 905 Maple Street Ludington, Michigan	Carl R. Johnson 5394 Howley Road Ludington, Michigan
Jack W. Geil 1035 Beechwood Drive Ludington, Michigan	Robert S. Genson 22 Tapago Boulevard Winslow, Arizona

All of the named witnesses (with the exception of Robert S. Genson) are essential to the proper presentation by defendant of its case and will be called by defendant to testify in this case. The substance of their expected testimony and its materiality to the alleged cause of action is set forth in the affidavit attached to this motion as Exhibit A and made a part hereof.

5. In addition, the physicians listed below have examined the plaintiff and have knowledge of his condition material to this case. Their attendance and in-court testimony is [fol. 49] essential to the proper presentation by the defendant of its defense to the plaintiff's alleged cause of action. The substance of their expected testimony and its materiality to the alleged cause of action is set forth in Exhibit A.

Richard C. Boelkins, M.D.
125-127 Fountain Street N.E.
Grand Rapids, Michigan

John R. Carney, M.D.
202 N. Park Street
Ludington, Michigan

E. T. Kruse, Chiropractor
388 First Street
Manistee, Michigan

I. J. Iverson, Chiropractor
909 South Washington Avenue
Ludington, Michigan

D. P. Moore, M.D., Radiology
50 College S. E.
Grand Rapids 3, Michigan

F. W. Sutter, M.D.
Ludington,
Michigan

Robert R. Garnau, M.D., Radiology
Paulina Stearns Hospital
Ludington, Michigan

6. The witnesses named in paragraphs 4 and 5 above would be called by defendant to testify in the United States District Court sitting in Grand Rapids, Michigan. However, the processes of the United States District Court for the Northern District of Illinois cannot be utilized to compel their attendance in this forum, and the below named witnesses have indicated by Exhibit A their refusal or inability [fol. 50] to testify concerning the facts of this case should the trial be held in this Court:

(1) Richard C. Boelkins, M.D.

(2) John R. Carney, M.D.

(3) E. T. Kruse, Chiropractor

(4) I. J. Iverson, Chiropractor

(5) D. P. Moore, M.D.

(6) F. W. Sutter, M.D.

(7) Robert R. Garnau, M.D.

7. Although the attendance of the other employee witnesses named in paragraph 4 above can be procured by defendant should the trial of this action take place in Chicago, Illinois, such trial will require their attendance at a place more than 300 miles from their places of work and their homes for periods of from one to three days each. In

addition to the cost of transporting these witnesses to Chicago, during their absences, defendant will be required to assign other persons, most of whom will not be equally familiar with the performance of their duties to perform the duties of the respective witnesses. Defendant will be required to pay the regular wages of the witnesses while absent from their work as well as the wages of the persons substituting for them, in addition to the traveling and hotel expenses of the witnesses.

8. The testimony of those witnesses which have indicated by Exhibit A their refusal or inability to attend trial in Chicago, will have to be presented to the Court and jury through the use of deposition evidence. Depositions are [fol. 51] not satisfactory means of presenting testimony to a jury. Accordingly, trial in this Court will seriously handicap defendant's presentation of its defense.

9. The crowded dockets of this Court preclude an early trial. Michigan courts are less congested and a trial within one year may be expected. Both parties will be prejudiced by delay.

10. The three (3) year statute of limitations does not expire until July 15, 1963. Plaintiff would in no way be prejudiced by the transferring of this action to the United States District Court sitting in Grand Rapids, Michigan.

11. There is no connection with Illinois and the occurrence out of which the purported cause of action arose.

12. The Circuit Court of Cook County, Illinois has held, prior to the commencement of this action in the United States District Court for the Northern District of Illinois, in an action captioned Jack J. Filbrun, Plaintiff vs. The Chesapeake and Ohio Railway Company, a corporation, Defendant, No. 61 C 2214, filed in the Circuit Court of Cook County, Illinois on February 10, 1961, that an Illinois forum is an inconvenient and inappropriate forum for the trial of this action. A copy of the pleadings, motion to dismiss of the defendant, and the court order, together with an order entered upon plaintiff's petition for a rehearing, is attached to this motion as Exhibit B and made a part

[fol. 52] hereof. The judgment of the Circuit Court of Cook County holding, as to the same parties to this action, that an Illinois court is an inconvenient and inappropriate forum, is res judicata on that point.

WHEREFORE, defendant, The Chesapeake and Ohio Railway Company, moves that the above entitled action be transferred to the United States District Court for the Western District of Michigan, Southern Division, Grand Rapids, Michigan.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Defendant

CHARLES J. O'LAUGHLIN,
Its Attorney

Thompson, Raymond, Mayer,
Jenner & Bloomstein
135 South LaSalle Street
Chicago 3, Illinois
RAndolph 6-0220

[fol. 53]

EXHIBIT "A" TO MOTION

AFFIDAVIT OF W. HAROLD WALLACE
DISTRICT CLAIM AGENT

STATE OF MICHIGAN)
) ss.
COUNTY OF SAGINAW)

W. Harold Wallace, being duly sworn, deposes and says that he resides at Saginaw, Michigan; that for the past 38 years he has been in the employ of The Chesapeake and Ohio Railway Company; and that for the last 33 years he has held the position of District Claim Agent with that company.

Affiant has caused to be interviewed the persons below listed, who constitute all of the persons to his knowledge having personal knowledge concerning the injury suffered by Jack J. Filbrun at Ludington, Michigan, on July 15,

1960. Affiant believes that the in-court testimony of these witnesses is essential to the proper presentation by defendant of its defense to Mr. Filbrun's purported cause of action. The names and addresses of the witnesses, together with the substance of their expected testimony are:

(1) Robert Bourgette
5451 Johnson Road
Ludington, Michigan

Mr. Bourgette is expected to testify that on July 15, 1950, he reported for duty at Ludington, Michigan, as conductor with engine 5224 to perform switching operations in the Ludington, Michigan area. He witnessed the incident whereby switchman Jack J. Filbrun fell from a boxcar brake platform. He was directly below Filbrun and broke [fol. 54] his fall by catching him. He inspected the condition of the hand brake which Filbrun was releasing when he fell, along with the condition of all equipment attendant thereto. All equipment was in perfect working order. He noticed nothing wrong with the brake platform, ladder, sill steps or any other part of the car when he went up to place the brake on the car soon after the accident occurred. All items of equipment mentioned above were free of all grease, oil, foreign objects and substances and were securely fastened and properly located and in good condition and repair.

(2) Vernon E. Vanderveer
910 Maple Street
Ludington, Michigan

Mr. Vanderveer is expected to testify that on the morning of July 16, 1960, he made an inspection along with assistant car foreman Rockwell Hayes of the boxcar from which Filbrun fell (C.N. 521723). He found that the ladders, grab irons, sill steps, brake platform, brake wheel, and hand holds were all securely fastened, properly located and free from grease, oil or foreign objects and substances and in good condition and repair with no exceptions. He made a working test of the hand brake by tightening it and re-

leasing it and found that it worked properly and was in good condition and repair.

(3) Rockwell C. Hayes
905 Maple Street
Ludington, Michigan

Mr. Hayes is expected to testify that he inspected the boxcar involved in the accident (C.N. 521723) at Ludington, [fol. 55] Michigan, on the morning of July 16, 1960. He made a working test of the brake by tightening it and releasing it and found the brake to be in good working condition. He found that the car involved was in good condition and repair and the grab irons, hand holds, and brake platform and the brake wheel and ladders were all in good condition and repair, securely fastened and properly located and all were free of grease, oil and all other foreign objects and substances.

(4) Carl R. Johnson
5394 Howley Road
Ludington, Michigan

Mr. Johnson is expected to testify that he is an employee of The Chesapeake and Ohio Railway Company as a locomotive engineer and has been in its service for the past 31 years. On July 15, 1960, at about 8:15 P.M., the weather was clear, the ground was dry and there was good visibility. When switchman Jack Filbrun fell, the train was standing still on track No. 1, at Ludington, Michigan. It was necessary to release the hand brake because the engine almost stalled when Johnson attempted to pull the cars. Johnson was operating the engine from the North side and Filbrun got down from the engine on that side to let brakes off the train. Filbrun climbed up the leading end of the boxcar which was next to the engine. He saw Filbrun fall. He saw conductor Bourgette break Filbrun's fall. He looked the car over and found everything in place and could see nothing wrong with the car and did not notice any grease, oil, or foreign objects or substances on the car. Nothing was loose on the car. He has known Mr. Filbrun since he [fol. 56] was about 14 years old and has worked the same job as Filbrun many times before the fall.

(5) Jack W. Geil
1035 Beechwood Drive
Ludington, Michigan

Mr. Geil is expected to testify that he was a switchman working at Ludington, Michigan, on July 15, 1960, with the same train crew as Jack Filbrun. He was about four cars east of where the accident occurred. His first knowledge of the accident was when he got down onto the ground, looked to the west and saw Filbrun lying on the ground. He found Filbrun conscious when he arrived. Filbrun was lying across the north rail of the track, track No. 1, the track the train was on, with his head to the north. The conductor, engineer and fireman were with him at the time. He saw the ambulance arrive shortly following the accident and Filbrun was taken from the scene. Filbrun did not blame his fall on faulty equipment.

(6) Robert S. Genson
22 Tapago Boulevard
Winslow, Arizona

Mr. Genson did not witness the accident and since his testimony would be cumulative, he will not be called by the defendant to testify.

Affiant has caused the employee witnesses identified above to be questioned concerning their willingness to go to Chicago, Illinois, for the purpose of testifying in this matter. They would go only if the Company ordered them to do so, paid all their transportation expenses plus other expenses [fol. 57] while in Chicago, plus full pay for all time spent on such a trip.

In addition to the employee witnesses, affiant has interviewed or received written reports from the following named physicians and chiropractors. Affiant believes that the in-court testimony of these witnesses is essential to the proper presentation by defendant of its defense to Mr. Filbrun's purported cause of action. The names and addresses of the physicians and chiropractors, together with the substance of their expected testimony are:

(1) Richard C. Boelkins, M.D.
125-127 Fountain Street N.E.
Grand Rapids, Michigan

Dr. Boelkins is expected to testify that he is a physician specializing in industrial medicine; that on October 18, 1960, and November 12, 1960, he saw Jack J. Filbrun professionally and treated him for alleged injuries arising out of an accident which occurred on July 15, 1960 at Ludington, Michigan. He took a medical history, examined Mr. Filbrun's back, ordered x-rays of the cervical and dorsal spine. The x-rays revealed no significant findings. In Dr. Boelkin's opinion, Filbrun had no signs of any injury.

Dr. Boelkin states that he would be unable to leave his practice for the time required to testify in Chicago. He states, however, that he would be able to testify concerning this matter in Grand Rapids, Michigan.

(2) I. J. Iverson, Chiropractor
909 South Washington Avenue
Ludington, Michigan

Dr. Iverson is expected to testify that he saw Filbrun [fol. 58] professionally on September 24, 26, 29, October 20 and November 7, 1960. Filbrun explained that he had fallen from a flat-car in July, 1960. Dr. Iverson could find nothing specific except some muscular tension. He recommended that Filbrun seek psychiatric help.

Dr. Iverson would be unable to leave his practice in Ludington, Michigan for the time required to testify in Chicago. He would be willing to testify concerning this matter in Grand Rapids, Michigan.

(3) John R. Carney, M.D.
202 N. Park Street
Ludington, Michigan

Dr. Carney is expected to testify that he saw Filbrun on August 8, 1960, again late in August, 1960, on September 13, 1960, and also about one week later. Filbrun complained of pain in the left flank and pyuria. He was given azogantrisin with prompt clearing of the infection. On September

13, 1960, and approximately a week later, Filbrun had a reoccurrence of the pyuria and again had a left pyeloneaphritis. He was given furadantin. The next week the urine was clear again, but he still complained of pain. An IVP was done and it was negative.

Dr. Carney would be unable to leave his practice for the time required to testify in Chicago. He indicates that he would be available to testify concerning this matter in a court in Grand Rapids, Michigan.

[fol. 59]

(4) D. P. Moore, M.D.
Radiology
50 College S. E.
Grand Rapids 3, Michigan

Dr. Moore is expected to testify that on November 12, 1960, at the reference of Dr. Boelkins, he examined x-rays of the cervical and dorsal spine region of Jack Filbrun. No evidence of osseous injury to the spine was observed. The intervertebral disc spaces were maintained. There was no abnormality in the upper dorsal or cervical spine, and none in the lower dorsal spine except for some mild hypertrophic lipping.

Dr. Moore states he would be unable to leave his practice for the time required to testify in Chicago. He states that he would be able to testify concerning this matter in Grand Rapids, Michigan.

(5) E. T. Kruse, Chiropractor
388 First Street
Manistee, Michigan

Dr. Kruse is expected to testify that he saw Filbrun on November 21, 28 and December 5, 1960. Filbrun complained of lower back pain and an examination revealed a lumbo sacral strain which was a routine condition. The condition responded satisfactorily and appeared corrected.

Dr. Kruse states that he would be unable to leave his practice for the time required to testify in Chicago. He states that he would be willing to testify concerning this matter in a court in Grand Rapids, Michigan.

[fol. 60]

(6) Dr. F. W. Sutter, M.D.
Ludington,
Michigan

Dr. Sutter is expected to testify that he saw Mr. Filbrun on several different dates following his injury on July 15, 1960. In his opinion Filbrun suffered back muscle bruising and strain and was released to return to work on August 31, 1960.

Dr. Sutter would be unable to leave his practice for the time required to testify in Chicago. He states that he would be willing to testify concerning this matter in a court in Grand Rapids, Michigan.

(7) Robert R. Garnau, M.D., Radiology
Paulina Stearns Hospital
Ludington, Michigan

Dr. Garnau is expected to testify that on September 20, 1960, at the request of Dr. J. Carney, he performed an x-ray examination of the abdomen of Jack Filbrun. No calculi were noted in the region of the urinary collecting systems to suggest a renal or ureteral calculi. The soft tissue shadows of the psoas muscles and kidney outlines were not abnormal. No abnormalities of the bony structures were noted. The test was negative.

Dr. Garnau would be unable to leave his practice for the time required to testify in Chicago. He states that he would be willing to testify concerning this matter in a court in Grand Rapids, Michigan.

W. Harold Wallace

Subscribed and sworn to before
me, a Notary Public authorized
to take oaths in the State of
Michigan, this day of ,
1961.

.....
Notary Public
My commission expires:

[fol. 61]

EXHIBIT I TO PETITION FOR MANDAMUS

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

NO. 61 C 1174

JACK J. FILBRUN,

Plaintiff.

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,

Defendant.

COUNTER-AFFIDAVIT BY PLAINTIFF IN OPPOSITION TO DEFENDANT'S MOTION TO TRANSFER

Keith E. Roberts, being first duly sworn, on oath deposes and says:

1. That affiant is a member of the law firm of HENSLEE & HENSLEE and is handling the instant cause on behalf of plaintiff. That acting in said capacity affiant has reviewed his investigative and medical file and on that basis submits this affidavit.

2. That following his accident and injury on July 15, 1960, plaintiff was examined by a succession of doctors, most of whom were selected by and/or compensated by defendant; that said doctors advised plaintiff that they could find nothing seriously wrong with him.

3. That on or about December 20, 1960, plaintiff came to the office of affiant seeking legal advice and competent medical care from an orthopedic specialist not affiliated or associated with a railroad company.

[fol. 62] 4. That on or about December 20, 1960, affiant arranged for an examination of plaintiff by a competent orthopedic specialist, G. J. Rabin, in Chicago. That as a result of that examination Dr. Rabin concluded and would so testify that plaintiff sustained a serious injury to the neck and lower back and recommended that plaintiff be hospitalized for conservative treatment.

5. That on January 17, 1961, plaintiff was admitted to Alexian Brothers Hospital in Chicago with acute pain in the neck with radiating pain and symptomatology down the left upper extremity and acute pain in the low back radiating down the lower extremities, that during said period of hospitalization plaintiff was placed in cervical and pelvic traction and was given an intensive course of physiotherapy and anti-spasmodic medication; that on or about February 3, 1961, plaintiff was discharged from said hospital.

6. That on February 17, 1961, plaintiff was readmitted to Alexian Brothers Hospital where a myelographic study was performed revealing a ruptured intervertebral defect; that on February 23, 1961, a laminectomy and spinal fusion was performed by G. J. Rabin, M. D. at which time a large ruptured intervertebral disc between L-5 and S-1, which was causing compression of the spinal cord, was removed; that plaintiff was fitted with a torso spica cast and discharged from the hospital on March 3, 1961.

7. That in the trial of this cause the doctor most competent to testify concerning the myelographic study and surgery performed upon plaintiff is G. J. Rabin, M. D.; that to induce said doctor to appear in Ludington or Grand Rapids, or elsewhere in Michigan, would require an expenditure by plaintiff of a minimum of $1,000.00; that arrangements can be made to have Dr. Rabin testify in this [fol. 63] court without causing him to forego any of the surgery customarily performed by said doctor five or six days per week.

8. That should defendant make any issue as to the condition, care or treatment of plaintiff, it would be necessary for plaintiff to produce as witnesses the roentgenologist, assisting surgeon, nurses, anesthetist and therapists at

Alexian Brothers Hospital who assisted in the care and treatment of plaintiff; that said witnesses, five or more in number could much more readily, more conveniently and less expensively be produced in Chicago than in a foreign jurisdiction; that the estimated cost to the plaintiff of producing said witnesses in a foreign jurisdiction would be approximately $1,500.00.

9. That to date plaintiff has incurred medical expenses in Chicago in the amount of $1,425.00 and hospital expenses in Chicago in the amount of $1,066.60; that plaintiff is now and hereafter will continue to be under the care of Dr. Rabin for a period of many months.

10. That to relieve defendant of any unnecessary expense plaintiff will produce the testimony of all occurrence witnesses in Chicago at plaintiff's expense.

KEITH E. ROBERTS

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

Subscribed and sworn
to before me this 12th day
of September, 1961.

.....
Notary Public

[fol. 64]
STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

AFFIDAVIT OF JACK J. FILBRUN

JACK J. FILBRUN, being first duly sworn, on oath deposes and says:

I live at 414 North Lewis Street, Ludington, Michigan with my wife and five children and that I am thirty-nine years old.

I have been employed by the Chesapeake and Ohio Railway Company as a switchman since 1953.

On July 15, 1960, at about 8:15 P.M., I suffered an injury to my side, neck and back when, while attempting to release a hand brake on a box car (CN521723), the brakes suddenly released causing me to fall to the ground.

Following the injury, I was taken by ambulance to Paulina Stearns Hospital in Ludington, Michigan. I was seen there that night by Dr. Sutter, the company doctor. X-rays were taken of my left side. I was badly shaken and they gave me a shot to calm my nerves. I was kept in the hospital for two weeks and was given many pills but no therapy other than being encouraged to walk. Throughout that period, Dr. Sutter was the treating doctor and he told me simply that I had a bad bruise.

Following the hospitalization, I remained at home two more weeks, and then Dr. Sutter ordered me back to work. At that time, I was still having pain in my back just as I had when I first went into the hospital. In fact, I was hardly able to walk into his office. About two days later, I returned to work. I continued to work off and on with a lot of pain.

After seeing Dr. Sutter on several occasions and getting no relief, on my own I went to see a Dr. Iverson, a chiropractor. His treatments gave me relief for about thirty minutes. So I then went to Supt. Gibson and asked him for additional medical treatment. I was sent to Dr. Richard Boelkens by the company. He took x-rays of my neck and back but gave me no treatment. I then saw another chiro-

practor, Dr. E. T. Kruse. I got no help from that source either.

[fol. 65] Finally, as a last resort, not knowing of any specialist in my area, I asked the company by a letter to Dr. Boelkens if he would refer me to a specialist. Dr. Boelkens had told me that if I continued to have trouble to write him and he would refer me to a orthopedic surgeon or a neurologist. On November 16, 1960, Dr. Boelkens wrote me saying that there was no evidence of disease or injuries to cause me any anxiety. On November 17, 1960, he again wrote me and told me that my request for examination by a specialist had been referred to the railroad claim department.

Neither the claim department or the medical department ever granted me that request to see a specialist. Instead, the railroad sent Claim Agent Collins to my home. He told me their medical reports indicated that there was nothing wrong with me and he tried to settle my case. He offered to pay me in full settlement of my case $1,010.36 and to repay sick benefits to the railroad retirement board in the amount of $357.00. Actually, at that time, I figured that my lost wages and expenses were greater than that. I refused to settle with him at that time on that basis because he didn't offer enough money and because I knew that I needed more medical attention which the company refused to furnish.

At that point which was about the middle of December, 1960, I decided that I needed legal advice to help me settle my claim and as I said before, I needed medical help from some one, some where. I wrote a letter following the claim agent's visit to the office of Henslee & Henslee in Chicago who are the legal counsel for my union, the Brotherhood of Railroad Trainmen. In that letter, I asked them to consider representing me. On December 16, Mr. Roberts of that office wrote to me and gave me an appointment for December 20, 1960.

I had known of Henslee & Henslee for several years before my accident because they handled cases against the C&O for other employees who had been injured on the job. I did consider hiring one lawyer in Ludington but I was told he did work for the C&O. I also felt that the counsel

[fol. 66] for the trainmen would do the best job because of their experience in my kind of case.

When I saw Mr. Roberts in Chicago on December 20th, he agreed to handle my case and after I explained to him the trouble I was having with my back and neck, he referred me to Dr. Rabin, an orthopedic surgeon. Later on, I was hospitalized and placed in traction and finally had an operation on my back in February.

I have tried to go back to work but the company doctor won't let me do so yet. Dr. Rabin thinks that I should be given a chance to do my work to see if I can do it and I am going back to work just as soon as the company will let me.

I felt that before getting legal advice that I should try to settle the case myself but I did not feel that their offer was fair. Also, if they had sent me to a specialist as I requested, and I really would have preferred getting medical care closer to home so that I could have been closer to my wife and children.

JACK J. FILBRUN

Subscribed and sworn to before me
this 1st day of December, 1961.

.....
Notary Public

[fol. 67]

EXHIBIT J TO PETITION FOR MANDAMUS

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
UNITED STATES COURT HOUSE
CHICAGO 4

Date: Dec. 15, 1961

Re:

JACK J. FILBRUN

vs.

THE CHESAPEAKE & OHIO RWY CO.

Case No. 61 C 1174

You are hereby notified that Judge Parsons entered the following order on 12-7-61:

Motion of deft to transfer cause denied, and answer to complaint to be filed by Jan. 8, 1962

ROY H. JOHNSON, Clerk

ht

[fol. 68]

EXHIBIT K TO PETITION FOR MANDAMUS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
No. 61 C 1174

JACK J. FILBRUN,

Plaintiff,

v.

THE CHESAPEAKE & OHIO RAILWAY,
a corporation,

Defendant.

PETITION BY DEFENDANT FOR REHEARING OF MOTION TO TRANSFER AND MOTION TO VACATE ORDER DENYING MOTION TO TRANSFER

Now comes defendant, The Chesapeake & Ohio Railway Company, by Charles J. O'Laughlin, Holland C. Capper, and Thompson, Raymond, Mayer & Jenner, its attorneys, and petitions this Court for a rehearing of defendant's motion to transfer; for the entry of an order vacating this Court's order of December 7, 1961, which denied defendant's motion to transfer; and for the entry of an order transferring this action to the United States District Court for the Western District of Michigan, Southern Division, Grand Rapids, Michigan.

As grounds for this petition and motion, defendant states that this Court was not sufficiently apprised of the effect of the order entered May 15, 1961, by the Honorable Thomas E. Kluczynski, a Judge of the Circuit Court of Cook [fol. 69] County, Illinois, which dismissed the identical action now pending before this Court between the identical parties, on the ground that the Circuit Court of Cook

County, Illinois, was an inconvenient and inappropriate forum.

For these reasons, defendant has prepared a comprehensive memorandum of law, attached to this petition, which fully presents and supports defendant's position that plaintiff was bound by the order of the Circuit Court of Cook County, Illinois, which held that an Illinois forum was an inconvenient and inappropriate place for the trial of this action, and could not relitigate that same issue by filing an identical lawsuit in this Court, located approximately six blocks from the Illinois State Court which had so held.

For these reasons, defendant prays that this Court reconsider defendant's motion to transfer, and upon such reconsideration, that it vacate its order denying said motion, grant the motion, and enter an order transferring the above entitled action to the United States District Court for the Western District of Michigan, Southern Division, Grand Rapids, Michigan.

THE CHESAPEAKE & OHIO RAILWAY COMPANY

By .....

.....

Its Attorneys

Thompson, Raymond,
Mayer & Jenner
135 S. LaSalle St.
Chicago 3, Illinois
RAndolph 6-0220
Of counsel

[fol. 70]

EXHIBIT L TO PETITION FOR MANDAMUS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
No. 61 c 1174

JACK J. FILBRUN,

Plaintiff,

v.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
a corporation,

Defendant.

ORDER

This cause coming on to be heard upon rehearing of defendant's motion to transfer pursuant to section 1404(a) of the Judicial Code, and both parties having submitted briefs and the Court having heard the arguments of counsel and being fully advised in the premises,

IT IS HEREBY ORDERED:

(1) That so much of the Order of February 9, 1962, as vacated the Order of December 7, 1961, denying defendant's motion to transfer be, and it is hereby set aside.

(2) That on rehearing defendant's motion to transfer pursuant to section 1404(a) of the Judicial Code be, and it is hereby denied.

ENTER:

March 20, 1962

.....
JUDGE

[fol. 71]

DOCKET ENTRIES

ORIGINAL PETITION FOR A WRIT OF MANDAMUS

Case No. 13701

CHESAPEAKE AND OHIO RAILWAY COMPANY, Petitioner,

vs.

HON. JAMES B. PARSONS, Judge, United States District Court for the Northern District of Illinois, Eastern Division, Respondent.

DATE	APPELLANT'S ACCOUNT	RECEIVED	DISBURSED
4/12/62	Thompson, Raymond, Mayer & Jenner	$25.00	
4/19/62	Costs		$25.00
		$25.00	$25.00

[fol. 72]

DATE	FILINGS—PROCEEDINGS
4/12/62	Docketed cause.
4/12/62	Filed original and 3 copies of Petition for Writ of Mandamus.
4/12/62	Filed 4 printed copies of a brief in support.
4/14/62	Filed appearance for the petitioner (C. J. O'Laughlin).
4/17/62	Entered Rule to Show Cause, returnable in 20 days.
4/17/62	Issued certified copy of Rule to Show Cause to respondent and his counsel.
4/18/62	Filed Clerk's proof of service of Petition for Writ of Mandamus and brief in support.

DATE	FILINGS—PROCEEDINGS
4/28/62	Filed letter from Judge Parsons that he approves of appointment of J. J. Naughton as his (respondent's) attorney.
5/ 1/62	Filed appearance for the respondent (J. J. Naughton).
5/ 4/62	Filed original and 3 copies of Answer to Petition for Writ of Mandamus.
5/ 7/62	Filed 4 copies of brief of respondent in support of Answer.
5/ 8/62	Entered order that this cause be added to the calendar and set down for oral argument on Tuesday, June 7, 1962.
5/21/62	Filed 30 copies of petitioner's reply brief.
6/ 7/62	Heard and taken under advisement.
6/27/62	Filed opinion by Castle, C. J.; concurring opinion by Major, C. J.; and dissenting opinion by Schnackenberg, C. J.
6/27/62	Entered judgment denying the Petition for Writ of Mandamus.
6/27/62	Issued certified copy of final decree of June 27, 1962 to counsel, respondent and Clerk, U. S. District Court.
7/11/62	Filed 30 copies of petitioner's Petition for Rehearing.
7/20/62	Filed 30 copies of respondent's Answer to Petition for Rehearing.
9/ 7/62	Filed opinion by Schnackenberg, C. J.; dissenting opinion by Castle, C. J.
9/ 7/62	Entered judgment that a Writ of Mandamus issue directing Hon. James B. Parsons to transfer cause from U. S. District Court for the Northern District of Illinois, Eastern Division, to the U. S. District Court for the Western District of Michigan, Southern Division, at Grand Rapids.

DATE	FILINGS—PROCEEDINGS
9/13/62	Issued certified copy of final order (decree) of September 7, 1962 to Clerk, U. S. District Court, Chicago, Judge Parsons and counsel.
9/21/62	Filed 30 copies of respondent's Petition for Rehearing.
10 /2/62	Filed 30 copies of petitioner's Answer to Petition for Rehearing.
[fol. 73]	Caption
[fol. 74]	
10/ 4/62	Entered order denying Petition for Rehearing.
10/ 4/62	Issued certified copy of denial of Petition for Rehearing dated October 4, 1962, to counsel, Clerk, U. S. District Court, Chicago and Judge Parsons.
10/11/62	Filed original and 4 copies of motion to recall decree and order denying rehearing issued to U. S. District Court, service.
10/23/62	Entered order granting a 30 day stay of execution (from October 4, 1962) of this Court's judgment of Mandamus entered on September 7, 1962; if within such time the Clerk of this Court receives a certificate from the Clerk of the Supreme Court of the United States that Certiorari Petition, Record and brief have been filed, then this stay shall be continued until final disposition by the Supreme Court.
10/23/62	Issued certified copy of order of October 23, 1962 to Clerk, U. S. District Court, Chicago, Judge Parsons and counsel.

[fol. 75]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

[Title omitted]

RULE TO SHOW CAUSE—April 17, 1962

This matter comes before the Court on the petition of counsel for the Chesapeake and Ohio Railway Company, filed herein on April 12, 1962, for a writ of mandamus to direct respondent to transfer the cause entitled Jack J. Filbrun, Plaintiff v. The Chesapeake and Ohio Railway Company, a corporation, Defendant, No. 61 C 1174, to the United States District Court for the Western District of Michigan, Southern Division, Grand Rapids, Michigan.

On consideration whereof, It Is Hereby Ordered that respondent show cause, if any there be, why a writ of mandamus should not issue as prayed for in said petition by filing in the office of the Clerk of this Court an original and five (5) copies of his response to this Rule within twenty (20) days from this date.

[fol. 76]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

ANSWER TO ORIGINAL PETITION FOR WRIT OF MANDAMUS—Filed May 4, 1962

To the Honorable Justices of the United States Court of Appeals for the Seventh Circuit:

Respondent, James B. Parsons, United States District Judge, by John J. Naughton, his attorney, for Answer to the Petition for Writ of Mandamus, says:

1. Respondent admits the allegations contained in Paragraphs 1 to 9 inclusive.

2. Respondent states that the Motion was taken on Briefs by the Honorable Julius J. Hoffman, United States District Judge. While the matter was under advisement, Petitioner,

on September 25, 1961 wrote Judge Hoffman a letter, a copy of which is attached hereto as Exhibit M in this action.

3. Respondent admits the allegations contained in Paragraph 10. Respondent further states that the Petitioner's [fol. 77] Motion was orally argued before him and that the Motion was taken under advisement on that argument on the Briefs previously filed, and on the Affidavits of the parties.

4. Respondent admits the allegations contained in Paragraph 11.

5. Respondent states that on January 10, 1962, Petitioner filed its Answer, a copy of which is hereto attached as Exhibit O in this action.

6. Respondent admits the allegations contained in Paragraph 12. Respondent further states that a Rehearing was granted the Petitioner; that oral argument was heard on that Rehearing; that Briefs were filed by the parties and that Affidavit of Plaintiff was filed on March 1, 1962 contemporaneously with the filing of the Plaintiff's Brief on Rehearing. On this Rehearing, Respondent again took the matter under advisement on all the papers filed on the Motion to Transfer.

7. Respondent admits the allegations contained in Paragraph 13.

8. Respondent denies each and every allegation contained in Paragraph 14 except that Respondent admits the factual allegations contained in sub Paragraphs 1, 2 and 7 of Paragraph 14 of the Petition. Respondent states that he carefully considered the Motions, the Affidavits, the Oral Arguments and the Briefs filed concerning the Petitioner's request for transfer, and that he decided that the Petitioner had failed to meet its burden of establishing that a transfer would be for the convenience of the parties and witnesses [fol. 78] and in the interests of justice. Respondent further states that he made a finding that he was not required to give full faith and credit to the judgment of the Circuit Court of Cook County which, in its discretion, dismissed the Plaintiff's Complaint.

WHEREFORE, Respondent requests that this Honorable Court refuse to issue a writ of mandamus directing him to transfer the Plaintiff's cause of action to the United States District Court for the Western District of Michigan, Southern Division, Grand Rapids, Michigan.

Respectfully submitted,

JAMES B. PARSONS,
United States District Judge,
Respondent

By JOHN J. NAUGHTON
John J. Naughton
139 N. Clark Street
Chicago 2, Illinois
STate 2-5925
Attorney for Respondent

[fol. 79]

EXHIBIT M TO ANSWER TO PETITION FOR MANDAMUS

September 25, 1961

Honorable Julius Hoffman
United States District Court
United States Court House
Chicago, Illinois

Re: Filbrun v. The Chesapeake and Ohio Railway Company—No. 61 C 1174

Dear Judge Hoffman:

I am in receipt of a memorandum submitted by the plaintiff in the above entitled matter, and although the order of the Court fixing the time for filing briefs did not provide for a reply brief, I am taking the liberty of writing you with the hope that you might find some of my thoughts on the plaintiff's brief meritorious.

Undisputed is the fact that seven doctors and the plaintiff reside close to the United States District Court in Grand Rapids. One witness resides close to the United States District Court in Chicago. Plaintiff, not unexpectedly, believes

that one witness, his witness, has more valuable testimony to submit in that he performed an operation upon the plaintiff. Defendant, also not unexpectedly, believes that the seven doctors who examined and treated plaintiff have equally, if not more valuable testimony to submit, in that they believed surgery was not, necessary. Equally, roentgenologists and assistants may be required to be produced by defendant to the same extent as plaintiff believes similar assistants might have to be produced by him. These factors do not militate for a different conclusion than the statistics themselves reveal. A trial in Grand Rapids is for the *convenience* of the parties and of the witnesses. No amount of argument can hide this basic fact.

Plaintiff's "offer" to produce testimony of occurrence witnesses in Chicago at his own expense is meaningless. It does not in any way argue for a conclusion different than the one stated above, i.e., a trial in Grand Rapids will be for the convenience of the parties and the witnesses. Besides plaintiff's offer is wholly unenforceable and should receive scant attention from the Court.

Plaintiff argues that the adjudication by the Circuit Court of Cook County, acquiesced in by the parties, to the effect that Chicago is an inconvenient forum, should receive little [fol. 80] weight by this Court, and this because the factors of the doctrine of "forum non conveniens" are not the same as set forth in this statute. (Section 1404(a) of the United States Judicial Code) The only trouble with plaintiff's argument is that the law dealing with *forum non conveniens* is more stringent and the authorization to dismiss more narrow than that found in Section 1404(a). All of the factors which may be considered in an adjudication of an inconvenient forum may be considered under Section 1404(a). The converse, however, is not true. This is true, of course, because under the doctrine of *forum non conveniens* the case is dismissed, whereas as under Section 1404(a) the case is merely transferred.

It is respectfully submitted that plaintiff has wholly failed to show that a transfer to the United States District Court for the Western District of Michigan, Southern Division,

sitting in Grand Rapids, would not be for the convenience of the parties and of the witnesses.

Respectfully submitted,

CHARLES J. O'LAUGHLIN

CJO:ax
cc: Mr. Keith Roberts

[fol. 81]

EXHIBIT O TO ANSWER TO PETITION FOR MANDAMUS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANSWER

Now comes The Chesapeake and Ohio Railway Company, a corporation, defendant, and for answer to the complaint of plaintiff, states as follows:

1. Defendant admits the allegations of paragraph 1.
2. Defendant admits the allegations of paragraph 2.
3. Defendant admits the allegations of paragraph 3.
4. Defendant admits the allegations of paragraph 4.
5. Defendant admits the allegations of paragraph 5.
6. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 6.
7. Defendant denies the allegations of paragraph 7.
8. Defendant denies the allegations of paragraph 8.

[fol. 82] WHEREFORE, defendant prays that the complaint of plaintiff be dismissed and that it have judgment for its costs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

By: Charles J. O'Laughlin
Holland C. Capper
Its Attorneys

THOMPSON, RAYMOND, MAYER, JENNER & BLOOMSTEIN

135 S. LaSalle Street
Chicago 3, Illinois
RAndolph 6-0220

[fol. 83]

EXHIBIT P TO ANSWER TO PETITION FOR MANDAMUS

STATE OF ILLINOIS,
COUNTY OF COOK, *ss.*:

AFFIDAVIT OF JACK J. FILBRUN

JACK J. FILBRUN, being first duly sworn, on oath deposes and says:

I live at 414 North Lewis Street, Ludington, Michigan with my wife and five children and that I am thirty-nine years old.

I have been employed by the Chesapeake and Ohio Railway Company as a switchman since 1953.

On July 15, 1960, at about 8:15 P.M., I suffered an injury to my side, neck and back when, while attempting to release a hand brake on a box car (CX521723), the brakes suddenly released causing me to fall to the ground.

Following the injury, I was taken by ambulance to Paulina Stearns Hospital in Ludington, Michigan. I was seen there that night by Dr. Sutter, the company doctor. X-rays were taken of my left side. I was badly shaken and they gave me a shot to calm my nerves. I was kept in the hospi-

tal for two weeks and was given many pills but no therapy other than being encouraged to walk. Throughout that period, Dr. Sutter was the treating doctor and he told me simply that I had a bad bruise.

Following the hospitalization, I remained at home two more weeks, and then Dr. Sutter ordered me back to work. At that time, I was still having pain in my back just as I [fol. 84] had when I first went into the hospital. In fact, I was hardly able to walk into his office. About two days later, I returned to work. I continued to work off and on with a lot of pain.

After seeing Dr. Sutter on several occasions and getting no relief, on my own I went to see a Dr. Iverson, a chiropractor. His treatments gave me relief for about thirty minutes. So I then went to Supt. Gibson and asked him for additional medical treatment. I was sent to Dr. Richard Boelkens by the company. He took x-rays of my neck and back but gave me no treatment. I then saw another chiropractor, Dr. E. T. Kruse. I got no help from that source either.

Finally, as a last resort, not knowing of any specialist in my area, I asked the company by a letter to Dr. Boelkens if he would refer me to a orthopedic surgeon or a neurologist. On November 16, 1960, Dr. Boelkens wrote me saying that there was no evidence of disease or injuries to cause me any anxiety. On November 17, 1960, he again wrote me and told me that my request for examination by a specialist had been referred to the railroad claim department.

Neither the claim department or the medical department ever granted me that request to see a specialist. Instead, the railroad sent Claim Agent Collins to my home. He told me their medical reports indicated that there was nothing wrong with me and he tried to settle my case. He offered to pay me in full settlement of my case $1,010.36 and to repay sick benefits to the railroad retirement board in the amount of $357.00. Actually, at that time, I figured that my [fol. 85] lost wages and expenses were greater than that. I refused to settle with him at that time on that basis because he didn't offer enough money and because I knew that I needed more medical attention which the company refused to furnish.

At that point which was about the middle of December, 1960, I decided that I needed legal advice to help me settle my claim and as I said before, I needed medical help from some one, some where. I wrote a letter following the claim agent's visit to the office of Henslee & Henslee in Chicago who are the legal counsel for my union, the Brotherhood of Railroad Trainmen. In that letter, I asked them to consider representing me. On December 16, Mr. Roberts of that office wrote to me and gave me an appointment for December 20, 1960.

I had known of Henslee & Henslee for several years before my accident because they handled cases against the C. & O. for other employees who had been injured on the job. I did consider hiring one lawyer in Ludington but I was told he did work for the C. & O. I also felt that the counsel for the trainmen would do the best job because of their experience in my kind of case.

When I saw Mr. Roberts in Chicago on December 20th, he agreed to handle my case and after I explained to him the trouble I was having with my back and neck, he referred me to Dr. Rabin, an orthopedic surgeon. Later on, I was hospitalized and placed in traction and finally had an operation on my back in February.

[fol. 86] I have tried to go back to work but the company doctor won't let me do so yet. Dr. Rabin thinks that I should be given a chance to do my work to see if I can do it and I am going back to work just as soon as the company will let me.

I felt that before getting legal advice that I should try to settle the case myself but I did not feel that their offer was fair. Also, if they had sent me to a specialist as I requested, I really would have preferred getting medical care closer to home so that I could have been closer to my wife and children.

.....

JACK J. FILBRUN

Subscribed and sworn to before me
this 1st day of December, 1961

.....

Notary Public

[fol. 87]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1961—APRIL SESSION, 1962

No. 13701

Original Petition for Writ of Mandamus

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Petitioner,

v.

THE HONORABLE JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, Respondent.

OPINION—June 27, 1962

Before Schnackenberg, Castle and Major, *Circuit Judges.*

CASTLE, *Circuit Judge.* This is a petition for a writ of mandamus to compel the respondent to transfer, pursuant to the provisions of 28 U.S.C.A. §1404(a),[1] a cause entitled *Jack J. Filbrun* v. *The Chesapeake & Ohio Railway Company*, Civil No. 61 C 1174, from the United States District Court for the Northern District of Illinois, Eastern Division, to the United States District Court for the Western District of Michigan, Southern Division, sitting at Grand Rapids, Michigan. A rule was issued on the respondent to show cause why the writ should not issue and [fol. 88] the matter is now before us for consideration on the petition, the respondent's answer thereto, including the exhibits attached to each, and the briefs and arguments of the respective parties.

[1] 28 U.S.C.A. §1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Filbrun's action against the petitioner railroad is a Federal Employers' Liability Act action for injuries alleged to have been received in a fall from a box car caused by a sudden release of a handbrake he was operating. Prior to its commencement in the District Court a substantially identical action filed by Filbrun against the petitioner in the Circuit Court of Cook County, Illinois, was dismissed on the railroad's motion on the ground that the Circuit Court of Cook County "is an inconvenient and inappropriate forum". Filbrun did not appeal that determination. He filed the District Court action and petitioner's motion for its transfer to the Western District of Michigan, Southern Division, pursuant to 28 U.S.C.A. §1404(a) was denied by respondent.

The contested issues presented for our determination are:

> (1) Whether the state court's determination, made under the *forum non conveniens* doctrine, estops Filbrun from maintaining his action in a court sitting in Cook County, Illinois, and requires the District Court to allow the petitioner's motion to transfer the action to the Western District of Michigan, Southern Division; and if it does not,
>
> (2) Whether, on the facts and circumstances presented, it is clearly established that the respondent's denial of the transfer sought constitutes an abuse of discretion.

The state Court's determination was an application of the *forum non conveniens* doctrine. This required consideration of the same relevant factors as those to be considered in applying §1404(a) (*Norwood* v. *Kirkpatrick*, 349 U.S. 29, 32) plus an additional and more stringent factor required by the Illinois decision governing the doctrine's application to F.E.L.A. cases (*Cotton* v. *Louisville and Nashville Railroad Company*, 14 Ill. 2d 144, 174, 152 N.E. 2d 385) that "only where it is shown that plaintiff is motivated purely by vexation and harassment will an F.E.L.A. case be dismissed" thereunder. Petitioner urges that because the state [fol. 89] court's determination required consideration of all factors relevant to an application of §1404(a) every point and question necessary to be passed upon in connection with

its motion to transfer has already been adjudicated adversely to Filbrun. From this premise petitioner argues that Filbrun is estopped from relitigating those matters and that the full faith and credit provisions of 28 U.S.C.A. §1738 require respondent to allow petitioner's motion to transfer.

The flaw in petitioner's contentions is that although the factors relevant to consideration of a motion to transfer under §1404(a)—matters bearing on the convenience of the parties and witnesses, and the interest of justice—are all also relevant areas of inquiry, consideration of which is pertinent and necessary to a determination of the applicability of the *forum non conveniens* doctrine, those factors do not in the instant case involve identical material factual issues. Petitioner's contentions on this phase of the case confuse the ultimate conclusion and determination of the state court that it "is an inconvenient and inappropriate forum" with the material factual issues involved in that determination. A factual issue in the state court proceeding was whether the availability of a state forum at Ludington, Michigan (the county seat of Mason County) where the incident occurred, and where Filbrun and most of the witnesses resided,[2] as well as the availability of a federal forum at Grand Rapids, Michigan, within some sixty miles of Ludington, when considered in the light of all other pertinent factors established that Filbrun's selection of the Circuit Court of Cook County at Chicago, Illinois, some three hundred miles from Ludington, was dictated purely by a desire to vex and harass the petitioner. But in resolving the issues involved in the motion to transfer the District Court action to the District Court at Grand Rapids the availability of a state forum at Ludington was not a factor

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[2] Subsequent to the fall, and his treatment and discharge by Ludington medical practitioners, Filbrun was hospitalized in Chicago where a laminectomy and spinal fusion was performed by a Chicago doctor to remedy a ruptured intervertebral disc. This Chicago orthopedic specialist would be Filbrun's chief medical witness. In addition, the medical and hospital records concerning the hospitalization, diagnosis, treatment and surgery are all located at Chicago as well as the roentgenologist and hospital staff who participated therein. Petitioner's occurrence witnesses are its own employees.

which the respondent could consider. He could transfer the [fol. 90] cause to a federal district court only—and the issues before him involved only the comparative convenience or inconvenience, and interest of justice, as measured by a choice between the District Court at Chicago, Illinois, and the District Court at Grand Rapids, Michigan. Thus, at least one material factual consideration was not identical in both proceedings.

The cases relied upon by the petitioner are therefore inapposite. In *Healea* v. *Verne*, 343 Ill. 325. 175 N.E. 562; *Chicago Title & Trust Co.* v. *National Storage Co.*, 260 Ill. 485, 103 N.E. 227 and *Hicks* v. *Hicks*, 20 Ill. App. 2d 139, 155 N.E. 2d 355, the estoppel recognized and applied, and in *Wayside Transportation Co.* v. *Marcell's Motor Express, Inc.*, 1 Cir., 284 F. 2d 868, the application of the mandate of 28 U.S.C.A. §1738, was grounded on an attempt to relitigate the *same* material fact or issue which had been the subject of a prior adjudication in an action or proceeding involving the parties.[3]

In the instant case the prior adjudication involved and required consideration of a material fact—the availability of a state court forum at Ludington—which was not subject to consideration in the subsequent proceeding. The test is not whether the same relevant factors or standards were applied in the determination of an issue but whether the same fact or question was determined. The question of the comparative convenience or appropriateness of the Ludington forum over a Chicago forum is not the same as the question of such relationship between a Grand Rapids forum[4] and a Chicago forum. In our opinion the determination of the Circuit Court of Cook County does not estop Filbrun from maintaining his action in the United States District Court for the Northern District of Illinois, Eastern Division, a permissible venue under the Federal Employers' Liability Act (45 U.S.C.A. §56), nor circum-

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[3] See also *Stangle* v. *Chicago, Rock Island and Pacific Railroad Company*, 7 Cir., 295 F. 2d 789, in which this Court approved an application of the doctrine of collateral estoppel.

[4] Except that petitioner is suable there, Grand Rapids has no connection with the action.

scribe the District Court in the exercise of its judgment and discretion in determining petitioner's motion to transfer the cause to Grand Rapids.

This Court recognizes the availability of mandamus as a remedy to rectify a district court's abuse of discretion [fol. 91] in the application of §1404(a). *Chicago, R. I. & P. R. Co.* v. *Igoe*, 7 Cir., 212 F. 2d 378; *Blaski* v. *Hoffman*, 7 Cir., 260 F. 2d 317. But as was pointed out by then Chief Judge, F. Ryan Duffy, "something more must be shown than an erroneous decision by the District Court. We emphasized that an abuse of discretion must clearly appear." *Sypert* v. *Miner*, 7 Cir., 266 F. 2d 196, 199, citing *Chicago, Rock Island & Pacific R. Co.* v. *Igoe*, 7 Cir., 220 F. 2d 299, 304.

We have considered the representations made, and reviewed the affidavits tendered with the pleadings, concerning the witnesses who would be called and the nature of the testimony each would give. Without discussing this and the other pertinent factors in detail we deem it sufficient to observe that the respondent's determination of the issues and disposition of the motion involved a balancing of the comparative convenience and inconvenience to the parties and witnesses, and an appraisal of the likelihood of difficulty or expense in the procurement of attendance of witnesses, and the probability of need to resort to the use of depositions, as bearing on the interest of justice. Whether we would have reached the same conclusion is not important. We cannot say that respondent has clearly abused the discretion he was called upon to exercise. Had it not been for the question of first impression precipitated by the estoppel and full faith and credit issues based on the state court determination, the petition for a writ of mandamus would have merited no more than the summary disposition called for by Judge Duffy's admonition in *Sypert* v. *Miner*, *supra*, (p. 199) that:

> "Mandamus is a drastic and extraordinary remedy and petitions therefor hereafter filed in this Court which, in fact, involve only an erroneous decision will, in all likelihood, be summarily denied. Members of the Bar should not file petitions for mandamus in transfer cases

unless they can make out a strong case of abuse of discretion."

The petition for mandamus is therefore denied.

PETITION DENIED.

[fol. 92] MAJOR, *Circuit Judge*, concurring. I concur in the result reached by Judge Castle, that is, that the petition for mandamus should be denied. As the parties state in their briefs, the question as to what, if any, effect respondent should have attributed to the state court judgment is one of first impression. Under the circumstances, I desire briefly to state my views in the matter.

It is my opinion that neither the doctrine of *res judicata* nor that of estoppel by verdict is applicable. Absent a case precisely in point, reason and logic support that view. The doctrine of forum *non conveniens* is quite different from Sec. 1404 (a). *Norwood et al.* v. *Kirkpatrick*, 349 U.S. 29, 31. In the same case, page 32, the court recognized that the transfer section was applicable "whether dismissal under the doctrine of forum *non conveniens* would have been appropriate or not."

The transfer provision places squarely upon the district court the duty to decide whether a transfer is for the convenience of parties and witnesses and in the interest of justice. I do not believe that a district court can be stripped of the authority and power so specifically bestowed, by the action of a state court under the doctrine of forum *non conveniens*, recognizable in a state court but superseded in a federal court by the enactment of Sec. 1404 (a).

As I understand, *res judicata* or estoppel by verdict constitute a bar to any further proceeding. Either doctrine, if applicable, would have been conclusive and respondent would have had nothing further to consider or decide. The convenience of parties and witnesses and the interest of justice would have been of no concern to him because those questions had been determined by a state court. Moreover, the plain language of the transfer statute would not require or permit a transfer on the basis of the applicability of either doctrine. Admittedly, the filing of the same action by

the plaintiff in another state court would have been subject to dismissal. It seems to me that the same result, not a transfer, would be required in a federal district court, which is one of concurrent jurisdiction with the state court in actions such as the one involved.

[fol. 93] I agree with the reasoning of Judge Castle from which he reaches the conclusion that there was no abuse of discretion on the part of respondent in his refusal to grant a transfer.

SCHNACKENBERG, *Circuit Judge*, dissenting.

Plaintiff selected the Circuit Court of Cook County, Illinois, in which to first file his personal injury suit against defendant railroad, based on alleged injuries sustained by him at Ludington, Mason County, Michigan, which is about 60 miles from Grand Rapids, where a United States District Court sits. Respondent is a judge of the United States District Court which sits in Chicago, in Cook County, Illinois.

The jurisdiction of the district courts in federal employers' liability cases is concurrent with that of the state courts. 45 U.S.C.A. § 56.

On motion of defendant, the state court dismissed plaintiff's action on the ground that the Circuit Court of Cook County, Illinois, is an inconvenient and inappropriate forum. It also denied plaintiff's motion for reconsideration of its action. Plaintiff took no appeal from either order. Instead, plaintiff's suit on the same cause of action was filed in the same city and county of Illinois but in the United States District Court.

The dismissal in the Illinois state court was based upon the doctrine of *forum non conveniens*. Respondent was required by 28 U.S.C.A. § 1738 to give full faith and credit to the order entered by the state court. *Wayside Transportation Co.* v. *Marcell's Motor Express, Inc.*, 284 F.2d 868, 870. This is especially true because it is a court of concurrent jurisdiction in administering the Federal Employers' Liability Act, as provided in that act, *supra*. Certainly if plaintiff had refiled his action in any state court in

Cook County, it would have been dismissed on the basis of the Circuit Court's dismissal.

There is an additional reason why the district court should have transferred the case to the federal court at Grand [fol. 94] Rapids, Michigan. In applying the doctrine of *forum non conveniens*, the state court, pursuant to Illinois law, applied all of the tests set forth in 28 U.S.C.A. § 1404 (a), which are (1) the convenience of the parties, (2) the convenience of the witnesses, and (3) the interest of justice. In applying that doctrine the state court was required additionally to determine whether plaintiff's selection of that court was dictated by a desire to vex and harass the petitioner. While it so held, that fact is immaterial here because the district court did not have to wrestle with that question. Plaintiff was, however, bound by the doctrine of estoppel by verdict,[1] because, on all of the other tests applied by the state court, its decision was adverse to plaintiff. These matters were again raised before the district court under § 1404 (a). Confronted by a final decision thereon by a court of concurrent jurisdiction, the district court had no discretion but to recognize the authoritative value of the state court's ruling, made in a case commenced there by plaintiff.

These reasons are sufficient upon which to grant the issuance of the writ requested. The transfer of this case to the federal district court 60 miles from plaintiff's home and the scene of his accident, and where many of the witnesses are available to both litigants, all combine to establish that justice would there be accomplished.

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[1] In *Stangle* v. *Chicago, Rock Island and Pacific R. R. Co.*, 295 F.2d 789, 791, we referred to a statement in regard to "estoppel by verdict" announced in *Rose* v. *Dolejs*, 7 Ill. App. 2d 267, 275, 129 N.E. 2d 281, 285, as follows:

"• • • 'estoppel by verdict or judgment, is but another branch of the doctrine of *res judicata*, and rests on the same principles as *res judicata*' • • • ".

[fol. 95]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before: Hon. Elmer J. Schnackenberg, Circuit Judge, Hon. Latham Castle, Circuit Judge, Hon. J. Earl Major, Circuit Judge.

No. 13701

Original Petition for Writ of Mandamus

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Petitioner,

vs.

THE HONORABLE JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, Respondent.

JUDGMENT DENYING PETITION FOR MANDAMUS—June 27, 1962

This matter comes before the Court on the petition of The Chesapeake and Ohio Railway Company for a writ of mandamus, the answer of respondent thereto, filed pursuant to a Rule To Show Cause heretofore issued by this Court, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the said petition of The Chesapeake and Ohio Railway Company for a writ of mandamus be, and the same is hereby Denied, in accordance with the opinion of this Court filed this day.

[fol. 96]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1962—SEPTEMBER SESSION, 1962

No. 13701

Original Petition for Writ of Mandamus

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
a Virginia corporation, Petitioner,

v.

THE HONORABLE JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, Respondent.

OPINION ON REHEARING—September 7, 1962

Before Schnackenberg, Castle and Major, Circuit Judges.

SCHNACKENBERG, *Circuit Judge.* On June 27, 1962 we filed an opinion and entered an order denying the petition of The Chesapeake & Ohio Railway Company, a Virginia corporation, praying for a writ of mandamus to compel the Honorable James B. Parsons, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, named as respondent, to transfer, pursuant to the provisions of 28 U. S. C. A. § 1404(a),[1] a cause entitled *Jack J. Filbrun*[2] v. *The Chesapeake & Ohio Railway Com-*
[fol. 97] *pany*, Civil No. 61 C 1174, from that court to the United States District Court for the Western District of

[1] 28 U. S. C. A. § 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[2] Filbrun is also referred to herein as "plaintiff".

Michigan, Southern Division, sitting at Grand Rapids, Michigan.

Upon petition for rehearing, we have ordered said opinion withdrawn and all orders entered pursuant thereto vacated and set aside.

A rule having been issued directing the respondent to show cause why a writ should not issue, the matter is now before us for consideration on the petition for a writ of mandamus, the respondent's answer thereto, including the exhibits attached to each, and the briefs and arguments of the respective parties, as well as the petition for rehearing and respondent's answer thereto, from all of which the following controlling facts appear:

> Filbrun's action against the petitioner railroad is a Federal Employers' Liability Act action for injuries alleged to have been received in a fall from a box car caused by a sudden release of a handbrake he was operating. Prior to its commencement in the District Court a substantially identical action filed by Filbrun against the petitioner in the Circuit Court of Cook County, Illinois was dismissed on the railroad's motion on the ground that the Circuit Court of Cook County "is an inconvenient and inappropriate forum". Filbrun did not appeal that determination. Instead he filed the United States District Court action and petitioner's motion for its transfer to the Western District of Michigan, Southern Division, pursuant to 28 U. S. C. A. § 1404(a) was denied by respondent.

Plaintiff selected the Circuit Court of Cook County, Illinois, in which to first file his personal injury suit against petitioner railroad, based on alleged injuries sustained by him at Ludington, Mason County, Michigan, which is about 60 miles from Grand Rapids, where a United States District Court sits. Respondent is a judge of the United States District Court which sits in Chicago, in Cook County, Illinois.

The jurisdiction of the district courts in federal employers' liability cases is concurrent with that of the state courts. 45 U. S. C. A. § 56.

On motion of defendant (petitioner here), the state court dismissed plaintiff's action on the ground that the Circuit Court of Cook County, Illinois, is an inconvenient and in- [fol. 98] appropriate forum. It also denied plaintiff's motion for reconsideration of its action. Plaintiff took no appeal from either order. Instead, plaintiff's suit on the same cause of action was filed in the same city and county of Illinois but in the United States District Court.

The dismissal in the Illinois state court was based upon the doctrine of *forum non conveniens*. Respondent was required by 28 U. S. C. A. § 1738 to give full faith and credit to the order entered by the state court. *Wayside Transportation Co.* v. *Marcell's Motor Express, Inc.*, 284 F. 2d 868, 870. This is especially true because it is a court of concurrent jurisdiction in administering the Federal Employers' Liability Act, as provided in that act, *supra*. Certainly if plaintiff had refiled his action in any state court in Cook County, it would have been dismissed on the basis of the Circuit Court's dismissal.

In applying the doctrine of *forum non conveniens*, the state court, pursuant to Illinois law, applied all of the tests set forth in 28 U. S. C. A. § 1404(a), which are (1) the convenience of the parties, (2) the convenience of the witnesses, and (3) the interest of justice. In applying that doctrine the state court was required additionally to determine whether plaintiff's selection of that court was dictated by a desire to vex and harass the petitioner. *Cotton* v. *L. & N. R. R. Co.*, 14 Ill. 2d 144, 166, 152 N. E. 2d 385, 396. While it made that additional finding, that fact is immaterial here because the district court did not have to wrestle with that question. Plaintiff was, however, bound by the doctrine of estoppel by verdict,[3] because, on all of the other tests applied by the state court, its decision was adverse to

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[3] In *Stangle* v. *Chicago, Rock Island and Pacific R. R. Co.*, 295 F. 2d 789, 791, we referred to a statement in regard to "estoppel by verdict" as announced in *Rose* v. *Dolejs*, 7 Ill. App. 2d 267, 275, 129 N. E. 2d 281, 285, as follows:

"• • • 'estoppel by verdict or judgment, is but another branch of the doctrine of *res judicata*, and rests on the same principles as *res judicata*' • • • ".

plaintiff. These matters were again raised before the district court under § 1404(a). Confronted by a final decision thereon by a court of concurrent jurisdiction, the district court had no discretion but to recognize the authoritative value of the state court's ruling, made in a case commenced there by plaintiff.

These reasons are sufficient upon which to grant the issuance of the writ requested. The transfer of this case to the federal district court 60 miles from plaintiff's home and [fol. 99] the scene of his accident, and where many of the witnesses are available to both litigants, all combine to establish that justice would there be accomplished.

The writ of mandamus will issue as prayed.

MANDAMUS GRANTED.

[fol. 100] CASTLE, *Circuit Judge*, dissenting.

I would deny the petition for mandamus. In my view of the matter the contested issues presented for determination are:

(1) Whether the state court's determination, made under the *forum non conveniens* doctrine, estops Filbrun from maintaining his action in a court sitting in Cook County, Illinois, and requires the District Court to allow the petitioner's motion to transfer the action to the Western District of Michigan, Southern Division; and if it does not,

(2) Whether, on the facts and circumstances presented, it is clearly established that the respondent's denial of the transfer sought constitutes an abuse of discretion.

The state court's determination was an application of the *forum non conveniens* doctrine. This required consideration of the same relevant factors as those to be considered in applying § 1404(a) (*Norwood* v. *Kirkpatrick*, 349 U. S. 29, 32) plus an additional and more stringent factor required by the Illinois decision governing the doctrine's application to F. E. L. A. cases (*Cotton* v. *Louisville and Nashville Railroad Company*, 14 Ill. 2d 144, 174, 152 N. E. 2d

385) that "only where it is shown that plaintiff is motivated purely by vexation and harassment will an F. E. L. A. case be dismissed" thereunder. Petitioner urges that because the state court's determination required consideration of all factors relevant to an application of § 1404(a) every point and question necessary to be passed upon in connection with its motion to transfer has already been adjudicated adversely to Filbrun. From this premise petitioner argues that Filbrun is estopped from relitigating those matters and that the full faith and credit provisions of 28 U. S. C. A. § 1738 require respondent to allow petitioner's motion to transfer.

The flaw in petitioner's contentions is that although the factors relevant to consideration of a motion to transfer under § 1404(a)—matters bearing on the convenience of the parties and witnesses, and the interest of justice—are all also relevant areas of inquiry, consideration of which is pertinent and necessary to a determination of the applicability of the *forum non conveniens* doctrine, those factors [fol. 101] do not in the instant case involve identical material factual issues. Petitioner's contentions on this phase of the case confuse the ultimate conclusion and determination of the state court that it "is an inconvenient and inappropriate forum" with the material factual issues involved in that determination. A factual issue in the state court proceeding was whether the availability of a state forum at Ludington, Michigan (the county seat of Mason County) where the incident occurred, and where Filbrun and most of the witnesses resided,[1] as well as the availability of a federal forum at Grand Rapids, Michigan, within some sixty miles of Ludington, when considered in the light of all other pertinent factors established that Filbrun's selection of the

[1] Subsequent to the fall, and his treatment and discharge by Ludington medical practitioners, Filbrun was hospitalized in Chicago where a laminectomy and spinal fusion was performed by a Chicago doctor to remedy a ruptured intervertebral disc. This Chicago orthopedic specialist would be Filbrun's chief medical witness. In addition, the medical and hospital records concerning the hospitalization, diagnosis, treatment and surgery are all located at Chicago as well as the roentgenologist and hospital staff who participated therein. Petitioner's occurrence witnesses are its own employees.

Circuit Court of Cook County at Chicago, Illinois, some three hundred miles from Ludington, was dictated purely by a desire to vex and harass the petitioner. But in resolving the issues involved in the motion to transfer the District Court action to the District Court at Grand Rapids the availability of a state forum at Ludington was not a factor which the respondent could consider. He could transfer the cause to a federal district court only—and the issues before him involved only the comparative convenience or inconvenience, and interest of justice, as measured by a choice between the District Court at Chicago, Illinois, and the District Court at Grand Rapids, Michigan. Thus, at least one material factual consideration was not identical in both proceedings.

The cases relied upon by the petitioner are therefore inapposite. In *Healea* v. *Verne*, 343 Ill. 325, 175 N. E. 562; *Chicago Title & Trust Co.* v. *National Storage Co.*, 260 Ill. 485, 103 N. E. 227 and *Hicks* v. *Hicks*, 20 Ill. App. 2d 139, 155 N. E. 2d 355, the estoppel recognized and applied, and in *Wayside Transportation Co.* v. *Marcell's Motor Express, Inc.*, 1 Cir., 284 F. 2d 868, the application of the mandate of 28 U. S. C. A. § 1738, was grounded on an [fol. 102] attempt to relitigate the same material fact or issue which had been the subject of a prior adjudication in an action or proceeding involving the parties.[2]

In the instant case the prior adjudication involved and required consideration of a material fact—the availability of a state court forum at Ludington—which was not subject to consideration in the subsequent proceeding. The test is not whether the same relevant factors or standards were applied in the determination of an issue but whether the same fact or question was determined. The question of the comparative convenience or appropriateness of the Ludington forum over a Chicago forum is not the same as the question of such relationship between a Grand Rapids forum[3] and a Chicago forum. In my opinion the determina-

[2] See also *Stangle* v. *Chicago, Rock Island and Pacific Railroad Company*, 7 Cir., 295 F. 2d 789, in which this Court approved an application of the doctrine of collateral estoppel.

[3] Except that petitioner is suable there, Grand Rapids has no connection with the action.

tion of the Circuit Court of Cook County does not estop Filbrun from maintaining his action in the United States District Court for the Northern District of Illinois, Eastern Division, a permissible venue under the Federal Employers' Liability Act (45 U. S. C. A. § 56), nor circumscribe the District Court in the exercise of its judgment and discretion in determining petitioner's motion to transfer the cause to Grand Rapids.

This Court recognizes the availability of mandamus as a remedy to rectify a district court's abuse of discretion in the application of § 1404(a). *Chicago, R. I. & P. R. Co.* v. *Igoe*, 7 Cir., 212 F. 2d 378; *Blaski* v. *Hoffman*, 7 Cir., 260 F. 2d 317. But as was pointed out by then Chief Judge, F. Ryan Duffy, "something more must be shown than an erroneous decision by the District Court. We emphasized that an abuse of discretion must clearly appear." *Sypert* v. *Miner*, 7 Cir., 266 F. 2d 196, 199, citing *Chicago, Rock Island & Pacific R. Co.* v. *Igoe*, 7 Cir., 220 F. 2d 299, 304.

I have considered the representations made, and reviewed the affidavits tendered with the pleadings, concerning the witnesses who would be called and the nature of the testimony each would give. Without discussing this and the other pertinent factors in detail I deem it sufficient to observe that the respondent's determination of the issues and disposition of the motion involved a balancing of the comparative convenience and inconvenience to the parties [fol. 103] and witnesses, and an appraisal of the likelihood of difficulty or expense in the procurement of attendance of witnesses, and the probability of need to resort to the use of depositions, as bearing on the interest of justice. Whether this Court would have reached the same conclusion is not important. In my opinion we cannot say that respondent has clearly abused the discretion he was called upon to exercise. Had it not been for the question of first impression precipitated by the estoppel and full faith and credit issues based on the state court determination, the petition for a writ of mandamus would have merited no more than the summary disposition called for by Judge Duffy's admonition in *Sypert* v. *Miner*, *supra* (p. 199), that:

"Mandamus is a drastic and extraordinary remedy and petitions therefor hereafter filed in this Court which, in fact, involve only an erroneous decision will, in all likelihood, be summarily denied. Members of the Bar should not file petitions for mandamus in transfer cases unless they can make out a strong case of abuse of discretion."

[fol. 104]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Friday, September 7, 1962

Before: Hon. Elmer J. Schnackenberg, Circuit Judge, Hon. Latham Castle, Circuit Judge, Hon. J. Earl Major, Circuit Judge.

No. 13701

Original Petition for Writ of Mandamus

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Virginia corporation, Petitioner,

vs.

THE HONORABLE JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, Respondent.

JUDGMENT GRANTING PETITION FOR MANDAMUS —September 7, 1962

This matter comes before the Court on the petition of The Chesapeake & Ohio Railway Company for a writ of mandamus, the answer of respondent thereto, including the

tion of the Circuit Court of Cook County does not estop Filbrun from maintaining his action in the United States District Court for the Northern District of Illinois, Eastern Division, a permissible venue under the Federal Employers' Liability Act (45 U. S. C. A. § 56), nor circumscribe the District Court in the exercise of its judgment and discretion in determining petitioner's motion to transfer the cause to Grand Rapids.

This Court recognizes the availability of mandamus as a remedy to rectify a district court's abuse of discretion in the application of § 1404(a). *Chicago, R. I. & P. R. Co.* v. *Igoe*, 7 Cir., 212 F. 2d 378; *Blaski* v. *Hoffman*, 7 Cir., 260 F. 2d 317. But as was pointed out by then Chief Judge, F. Ryan Duffy, "something more must be shown than an erroneous decision by the District Court. We emphasized that an abuse of discretion must clearly appear." *Sypert* v. *Miner*, 7 Cir., 266 F. 2d 196, 199, citing *Chicago, Rock Island & Pacific R. Co.* v. *Igoe*, 7 Cir., 220 F. 2d 299, 304.

I have considered the representations made, and reviewed the affidavits tendered with the pleadings, concerning the witnesses who would be called and the nature of the testimony each would give. Without discussing this and the other pertinent factors in detail I deem it sufficient to observe that the respondent's determination of the issues and disposition of the motion involved a balancing of the comparative convenience and inconvenience to the parties [fol. 103] and witnesses, and an appraisal of the likelihood of difficulty or expense in the procurement of attendance of witnesses, and the probability of need to resort to the use of depositions, as bearing on the interest of justice. Whether this Court would have reached the same conclusion is not important. In my opinion we cannot say that respondent has clearly abused the discretion he was called upon to exercise. Had it not been for the question of first impression precipitated by the estoppel and full faith and credit issues based on the state court determination, the petition for a writ of mandamus would have merited no more than the summary disposition called for by Judge Duffy's admonition in *Sypert* v. *Miner*, *supra* (p. 199), that:

"Mandamus is a drastic and extraordinary remedy and petitions therefor hereafter filed in this Court which, in fact, involve only an erroneous decision will, in all likelihood, be summarily denied. Members of the Bar should not file petitions for mandamus in transfer cases unless they can make out a strong case of abuse of discretion."

[fol. 104]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Friday, September 7, 1962

Before: Hon. Elmer J. Schnackenberg, Circuit Judge, Hon. Latham Castle, Circuit Judge, Hon. J. Earl Major, Circuit Judge.

No. 13701

Original Petition for Writ of Mandamus

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
a Virginia corporation, Petitioner,

vs.

THE HONORABLE JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, Respondent.

JUDGMENT GRANTING PETITION FOR MANDAMUS
—September 7, 1962

This matter comes before the Court on the petition of The Chesapeake & Ohio Railway Company for a writ of mandamus, the answer of respondent thereto, including the

exhibits attached to each, and the briefs and arguments of the respective parties; as well as the petition for rehearing, and respondent's answer thereto. It is therefore ordered that said petition for rehearing be granted.

On consideration whereof, it is ordered and adjudged by this Court that the opinion of this Court filed on June 27, 1962, and all orders entered pursuant thereto be vacated and set aside.

It is further ordered and adjudged by this Court that a writ of mandamus issue directing Honorable James B. Parsons, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, to transfer, pursuant to the provisions of 28 U.S.C.A. §1404(a), the cause entitled *Jack J. Filbran* v. *The Chesapeake & Ohio Railway Company*, Civil No. 61 C 1174, from that Court to the United States District Court for the Western District of Michigan, Southern Division, sitting at Grand Rapids, Michigan.

[fol. 105]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—October 4, 1962

It Is Ordered by the Court that the petition for rehearing filed by respondent herein be, and the same is hereby, denied.

[fol. 106]

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

[Title omitted]

ORDER GRANTING STAY OF EXECUTION OF JUDGMENT GRANTING PETITION FOR MANDAMUS—October 23, 1962

This matter comes before the Court on the motion of counsel for the respondent to recall from the United States District Court for the Northern District of Illinois, Eastern Division, the certified copy of the final decree entered on September 7, 1962, and the certified copy of the order of October 4, 1962 denying respondent's petition for rehearing; and the Court having noted that on September 7, 1962, a judgment was entered directing the issuance of a writ of mandamus against respondent and that on October 4, 1962, respondent's petition for rehearing was denied;

It Is Hereby Ordered that the execution of this Court's judgment of mandamus entered on September 7, 1962, be stayed for a period of thirty (30) days from October 4, 1962, and if within such thirty (30) days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States certifying that a certiorari petition, record and brief have been filed, the stay shall continue until final disposition by the Supreme Court.

[fol. 107] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 108]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed January 7, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962

No. 32

THE HONORABLE JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division,

Petitioner,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOHN J. NAUGHTON,
205 West Wacker Drive,
Chicago 6, Illinois,

Attorney for Petitioner.

CHAMPLIN-SHEALY COMPANY, CHICAGO 868

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

No.

THE HONORABLE JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division,

Petitioner,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Honorable JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on September 7, 1962.

OPINION BELOW

The second Opinion of the Court of Appeals is not yet reported. That Opinion is Appendix A to this Petition.

JURISDICTION

The judgment of the Court of Appeals on rehearing was entered September 7, 1962 (Appendix A), infra, p. 10a, vacating the Court's denial of a writ of mandamus entered June 27, 1962, and entering a writ of mandamus compelling the transfer of an action under the Federal Employers' Liability Act to the United States District Court, Grand Rapids, Michigan. A Petition for Rehearing on the judgment of September 7, 1962 was denied by the Court of Appeals on October 4, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTION PRESENTED

Whether full faith and credit requires a district court on a motion to transfer under 28 U. S. C. 1404 (a) to transfer an action brought under the Federal Employers' Liability Act that had previously been dismissed by a state court in the same district.

STATUTES INVOLVED

Section 1404 (a) of the Judicial Code of 1948, 62 Stat. 937, 28 U. S. C. 1404 (a), Section 1738 of the Judicial Code of 1948, 62 Stat. 947, 28 U. S. C. 1738, and Section 6 of the Federal Employers' Liability Act as Amended, 35 Stat. 66, 45 U. S. C. 56 are set forth in Appendix B hereto.

STATEMENT

This case arises out of a cause of action brought on behalf of a plaintiff who was, and is, a resident of Ludington, Michigan. The case involves only the question of the ruling of the United States District Court in denying a motion to transfer that cause of action to Grand Rapids, Michigan on the motion of the respondent brought under the provisions of 28 U. S. C. 1404 (a). The Court of Appeals in its second Opinion issued a writ of mandamus compelling the transfer sought by respondent.

The underlying cause of action grew out of facts in which the plaintiff was injured while employed by the railroad in its East Yard in Ludington on July 15, 1960. He was operating a hand brake on a box car when it suddenly released and threw him to the ground. He was hospitalized for 2 weeks and was treated by Dr. Sutter, the company doctor. He then remained at home for 2 more weeks before he was ordered back to work by Dr. Sutter. Plaintiff worked off and on with considerable pain. Plaintiff saw two chiropractors of his own choosing in this period and also saw Dr. Boelkens who did not give him any treatment (Record 84).

Plaintiff requested the railroad to refer him to a specialist. His request was not granted but Respondent's claim agent attempted to settle the case on the basis that the medical reports showed that there was nothing wrong with him. Plaintiff refused to settle because he needed more medical attention. Because he did not know of any specialist in his area, he sought out his counsel for legal help and for medical help (Record 84).

Plaintiff's attorney referred him to an orthopedic specialist, Dr. G. J. Rabin of Chicago. After examination, Dr.

Rabin found the plaintiff had a serious injury to the neck and lower back and recommended that he be hospitalized for conservative treatment. Plaintiff was admitted to Alexian Brothers Hospital in Chicago on January 17, 1961. At that time he had acute pain in the neck with radiating pain and symptomatology down the left upper extremity with acute pain in the low back radiating down the lower extremities. While in the hospital plaintiff was placed in cervical and pelvic traction and was given an intensive course in physiotherapy and anti-spasmodic medication. Plaintiff was discharged on February 3, 1961. On February 17, 1961, Plaintiff was readmitted to Alexian Brothers Hospital where a myelographic study performed revealed a ruptured intervertebral defect. On February 23 a laminectomy and spinal fusion was performed by Dr. Rabin who removed a large ruptured intervertebral disc between L-5 and S-1 which was causing compression of the spinal cord. The Plaintiff was fitted with a torso spica cast and he was discharged from the hospital on March 3, 1961 (Record 62).

Preceding the instant suit in the District Court, plaintiff filed an action in the Circuit Court of Cook County. That Court dismissed the action on the ground that it " was an inconvenient and inappropriate forum" (Record 30).

Plaintiff then filed the action involved herein in the District Court at Chicago on July 11, 1961. On August 23, the Respondent filed its Motion To Transfer under 28 U. S. C. 1404 (a). Its affidavit in support thereof was sworn to by its District Claim Agent. Robert Bourgette and Carl R. Johnson were fellow employees who saw the plaintiff fall from the box car. Bourgette also inspected the hand brake which the Plaintiff was releasing and found it in good working order. Fellow employee Geil did not witness the accident or inspect the hand brake. He did see the plaintiff lying on the ground until he was placed in an ambu-

lance. Vanderveer and Hayes inspected the equipment on the box car on the day following the plaintiff's injury. Ginson would not be called by Respondent and he did not witness the Plaintiff's injury (Record 53-57). All of these employee witnesses would testify in Chicago if compensated for time lost and expenses.

In his Counter-Affidavit, Plaintiff offered to produce all occurrence witnesses at the trial at Plaintiff's expense (Record 63).

The affidavit filed by Respondent also stated that testimony of seven physicians or chiropractors was necessary for its defense. Dr. Sutter, the company doctor previously mentioned, would testify that he released the plaintiff for work on August 31, 1960 and that plaintiff suffered a bruising and strain of his back muscles. Dr. Carney would testify that he treated the Plaintiff for a kidney infection in August and September of 1960. Dr. Garnau that he performed an x-ray examination of the Plaintiff's abdomonen on September 20, 1960 at Dr. Carney's request. The kidneys were normal and no kidney stones were found (Record 58, 60).

Dr. Iverson, a chiropractor, saw the plaintiff in September, October and November of 1960. He would testify that he could find nothing specific except some muscular tension. Dr. Boelkens would testify that he saw the Plaintiff on October 18 and November 12, 1960 and would testify that he found no signs of any injury. Dr. Moore, a radiologist, examined x-rays of the Plaintiff's cervical and dorsal spine at the request of Dr. Boelkens. He found no evidence of injury (Record 57-59).

The Plaintiff's Affidavit states that he was sent to Dr. Boelkens by the company and that Dr. Boelkens told the plaintiff that if he continued to have trouble he would be

referred to an orthopedic surgeon or a neurologist. When the plaintiff requested a specialist, Dr. Boelkens wrote him that his request had been referred to the claim department. (Record 84). As previously stated, Plaintiff's request to see a specialist was never granted.

The last of these seven witnesses to see the plaintiff was E. T. Kruse, a chiropractor, in November and December 1960. He found a lumbo sacral strain which responded satisfactorily and appeared corrected. (Record 59). The railroad stated that each of these seven witnesses would be unable to leave his practice for the time required to testify in Chicago but that each would be willing to testify in Grand Rapids, Michigan.

Following this last medical examination in Michigan, Plaintiff was twice hospitalized in Chicago, Illinos for periods of 17 and of 14 days. During the second period, a positive myelogram was found and a laminectomy and spinal fusion was performed by Dr. Rabin. Plaintiff stated that Dr. Rabin was required as a witness and that it would cost the plaintiff a minimum of $1,000.00 for Dr. Rabin's presence in Michigan, and that Dr. Rabin's testimony could be presented in Chicago without causing him to forego any of the surgery customarily performed by him 5 or 6 days per week. Plaintiff also stated that a controversy as to the condition of the plaintiff would require him to produce the roentgenologist, the assisting surgeon, nurses, anesthetist and therapist at Alexian Brothers Hospital. It was also stated that Plaintiff's medical expenses in Chicago were then $1,425.00 and that his hospital bill was in the amount of $1,066.00 and that plaintiff remained under the care and treatment of Dr. Rabin (Record 63).

The railroad's Motion To Transfer was denied on December 7, 1961 with Petitioner given 30 days to Answer or other-

wise move. On January 10, 1962, Petitioner filed its Answer which stated that it was without knowledge or information sufficient to form a belief as to the truth of the plaintiff's allegation that the hand brake suddenly and violently released while he was attempting to release causing him to fall from the car (Record 81, 43).

On February 9, 1962, Petitioner was granted a re-hearing on its Petition. Oral argument was heard and briefs were submitted on the re-hearing. The Motion To Transfer, on re-hearing, was again denied on March 20, 1962.

On such facts, the Court of Appeals first handed down an Opinion denying the writ of mandamus sought by the railroad. On re-hearing, that Court set aside its previous Opinion and Orders and issued the writ of mandamus based on its conclusion that Petitioner was without discretion but was required to recognize the decision of the Circuit Court of Cook County and was, therefore, required to transfer the case to the United States District Court at Grand Rapids, Michigan. In accordance with this Opinion, the Court of Appeals issued a writ of mandamus compelling this Petitioner to transfer the cause. This Petition seeks a review only of the Opinion and Order divesting Petitioner of all discretion and of any power to consider the Motion To Transfer in accordance with the provisions of 28 U. S. C. § 1404 (a).

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided important questions of federal jurisdiction and federal practice which have not been, but should be, settled by this Court.

A. The Court of Appeals in a novel decision for the first time in federal jurisprudence has decided that a fed-

eral court is required to give full faith and credit to the discretionary act of a state court.

B. The holding that the district court had no discretion to consider the standards set out in 28 U. S. C. § 1404 (a) because other state courts in Cook County would have dismissed on the basis of the Circuit Court's dismissal wrongly and erroneously deprives the federal courts of jurisdiction granted by Congress.

C. The Opinion of the Court of Appeals is in direct conflict with this court's decision in *Angel* v. *Bullington*, 330 U. S. 183, holding that a plaintiff is not barred when some of the Courts of the state are closed to him.

D. The decision grants mandamus despite the conflict of the circuits as to the power to issue such writ and despite the express reservation of that question in *Norwood* v. *Kirkpatrick*, 349 U. S. 29, 33, not to correct an abuse of discretion in applying 28 U. S. C. § 1404 (a) but to obliterate all discretion in a case arising under a federal statute because a state court had dismissed the same action in the exercise of the discretion granted it under the applicable state law.

E. The decision wrongfully and erroneously deprives the plaintiff of his federal rights by establishing a non-existent doctrine of exhaustion of judicial remedies which would compel the plaintiff to appeal the discretionary order of the state court or forfeit his federal right to a choice of forum.

F. The decision wrongfully and erroneously attempts to rely on a misapplication of the doctrine of estoppel by verdict to bind the plaintiff and to support the holding that the federal court was stripped of all discretion and of all judicial power and relegated to a clerical status.

ARGUMENT

The cause of action underlying this Petition had previously been dismissed by the Circuit Court of Cook County on its finding that it "was an inconvenient and inappropriate forum". The same cause of action was then filed in the United States District Court in Chicago, Illinois. The decision below compels the Petitioner to transfer the cause of action to the District Court at Grand Rapids, Michigan. In such decision, the Court of Appeals stripped Petitioner of all discretion, deprived Petitioner of the power to consider the standards of 28 U. S. C. § 1404 (a), and relegated the federal court's jurisdiction to a position inferior to that of the Circuit Court of Cook County. The compulsions of full faith and credit were held to require this result.

The case at bar is the first to hold that full faith and credit requires that a federal court be divested of all discretion because another court has exercised discretion when the same cause was pending before it. By accenting some similarities, the Court of Appeals has ignored the differing material factual issues so capably summarized in the Dissenting Opinion.

The novelty of this decision is manifest in its holding that the discretion of a state judge in dismissing a cause of action from a county court obliterates the discretion of a federal court granted under federal statute. The only case cited for this astounding result is *Wayside Transp. Co.* v. *Mercell's Motor Express, Inc.*, 284 F. 2d 868, 870. A careful consideration of that case establishes that the plaintiff therein had by counsel previously challenged the jurisdiction of a Vermont Court. The Vermont Court having decided that it had jurisdiction certified the case to the Supreme Court of Vermont before trial. Plaintiff's attorney

refused to appear further in the case and did not appeal. Following various settings for pretrial conferences, the Vermont Court entered a default judgment against the non-appearing party. Subsequently the defendant in the Vermont action filed suit on the same cause of action in the Federal Court in Massachusetts. The default judgment was pleaded in a counterclaim and the District Court granted summary judgment in the main case for the defendant, and entered judgment on defendant's counterclaim. It is in these circumstances that the Court of Appeals wrote the Opinion relied on by the court below. The Court of Appeals, of course, affirmed the judgment since it is well established law that a person or party who contests jurisdiction and loses on that issue must appeal. As the Court of Appeals there points out, there was no necessity to appear in the Vermont action since the question of jurisdiction was open to litigation in a suit on any judgment obtained in any Court in which that judgment was attempted to be enforced. A mere recitation of the facts in the case cited by the Court of Appeals shows that it is in no way applicable to the present factual situation. That case is based solely on the doctrine of *res judicata*. It is true that full faith and credit implements that doctrine in the case, but the case would be decided in the same manner absent any application of full faith and credit.

However, the doctrine of res judicata applies only to a final judgment of the merits. The instant case, on the other hand, is admittedly a mere judgment of dismissal and the plaintiff was free to exercise his choice of forum since the decision of the Circuit Court did not purport to bar his cause of action. The Court of Appeals erroneously infers some measure of finality in its statement that other state courts in Cook County would have dismissed on the basis of the Circuit Court's dismissal. Even if true, such fact is

irrelevant and wrongfully and erroneously divests the federal court of jurisdiction granted by Congress for the express purpose of extending the jurisdiction of the federal courts beyond the territorial limits of the county in which the federal court sits. Moreover, the Opinion of the Court of Appeals in imposing and inferring such finality directly conflicts with the Opinion of this Court in *Angel* v. *Bullington*, 330 U. S. 183, which squarely holds that a plaintiff is not barred from litigating in the federal courts unless, and until, it has been finally decided that all of the courts of the state in which he brought his preceding litigation are closed to him. This Court there states the converse of the Court of Appeals proposition and holds that a plaintiff is not barred when only some of the courts of the state are closed to him.

The basic error in the holding of the Court of Appeals is seen when a hypothetical case is considered. Assuming that the same injury was sustained by the plaintiff in an occurrence in East Chicago, Indiana, it is plain that the removal of any discretion from the District Court would require the court to transfer the suit to a federal court in Indiana. This would be true even though the place of the accident would be well within the 100 miles within which a federal court may issue a subpoena for trial under the provisions of Rule 45 (e) (1) of the Federal Rules of Civil Procedure.

Despite the differences in the material factual issues and in the territorial jurisdictions of the courts here involved, the writ of mandamus was issued in perpetuation of the present conflict between the circuits as to whether such a writ lies, and despite the express reservation of that question in *Norwood* v. *Kirkpatrick*, 349 U. S. 29, 33. Moreover, the Court of Appeals issued the writ not to correct an abuse of discretion in applying the principles as stated in 28 U. S. C. § 1404 (a), but to order the cause transferred

without any consideration of the principles raised by the Motion To Transfer filed by the railroad. This is done despite the clear intent of Congress to invest the District Court with a broad discretion on motions to transfer and, specifically, to decide questions relating to the convenience of the party, the convenience of the witnesses, and the interest of justice. This Congressional intention is confirmed by this Court in *Norwood* v. *Kirkpatrick*, 349 U. S. 29, 33. The discretion vested in the District Court, moreover, is much broader than the applicable law binding the Circuit Court of Cook County. The state law is stated in *Cotton* v. *L. & N. Railroad Company*, 14 Ill. 2d 144, 152 N. E. 2d 385 where the Supreme Court of Illinois held that the issue of the motivation of the plaintiff is the only issue for determination on a Motion to Dismiss on the ground of *forum non conveniens*. The Illinois Supreme Court held that only where an FELA plaintiff is motivated purely by vexation and harassment may an Illinois state court dismiss his action on such a basis. Thus the Circuit Court was required to base its determination on its finding as to the state of mind of the plaintiff in filing his law suit but instead based its determination on its sole finding that it "was an inconvenient and inappropriate forum". The governing principles are therefore seen to be so diverse that no basis whatsoever is provided for the holding of the Court of Appeals.

The Opinion of the Court of Appeals relies on the fact that the plaintiff took no appeal in the dismissal of his cause of action in the state court. In so doing, the decision wrongfully and erroneously establishes a non-existent doctrine of the exhaustion of judicial remedies which would compel plaintiffs to appeal discretionary orders of state courts or suffer the peril of being barred from enforcing

the right to a choice of forum granted FELA plaintiffs in Section 6 of the Federal Employers' Liability Act because of the misapplication and expansion of full faith and credit by the court below.

The court below also relied on the doctrine of estoppel by verdict to buttress its conclusion that full faith and credit barred all consideration of the standards of 28 U. S. C. § 1404 (a). Such reliance was a misapplication because the order of the Circuit Court did not constitute a final judgment but, instead, was a mere dismissal and because any estoppel by verdict is squarely limited to the question actually determined by the original action, not to what might have been litigated and determined *Cromwell* v. *Sac County*, 94 U. S. 351. The specific finding that the Circuit Court "was an inconvenient and inappropriate forum" does not exhaust the standards contained in the federal Motion To Transfer.

Plaintiff here asserts a federal right which is governed by the Opinions of the federal courts. In the case below, the plaintiff sought only such a determination which was granted by Petitioner. The effect of the Opinion of the Court of Appeals is to take these matters out of the hands of the federal courts and to require a federal court, sitting in a federal action, to sit as a federal court does in an action brought in its court by virtue of diversity of citizenship. As to such cases, there are many qualifications to the general rule that a federal court sitting in diversity sits as another state court. Until the Opinion below, there was no qualification to the general rule that a federal court sitting in an action brought under federal law was governed solely by federal and not by state law.

CONCLUSION

For the reasons adverted to above and because of the demands of the law and substantial justice, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN J. NAUGHTON,
205 West Wacker Drive,
Chicago 6, Illinois,
STate 2-5925,

Attorney for The Honorable James B. Parsons, United States District Judge, Petitioner.

APPENDIX A

In The

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 13701 SEPTEMBER TERM, 1962, SEPTEMBER SESSION, 1962

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Virginia Corporation, *Petitioner,* vs. THE HONORABLE JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, *Respondent.*	Original Petition for Writ of Mandamus.

OPINION ON REHEARING
September 7, 1962

Before SCHNACKENBERG, CASTLE and MAJOR, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* On June 27, 1962 we filed an opinion and entered an order denying the petition of The Chesapeake & Ohio Railway Company, a Virginia corporation, praying for a writ of mandamus to compel the Honorable James B. Parsons, Judge of the United States

District Court for the Northern District of Illinois, Eastern Division, named as respondent, to transfer, pursuant to the provisions of 28 U. S. C. A. § 1404(a),[1] a cause entitled *Jack J. Filbrun*[2] v. *The Chesapeake & Ohio Railway Company*, Civil No. 61 C 1174, from that court to the United States District Court for the Western District of Michigan, Southern Division, sitting at Grand Rapids, Michigan.

Upon petition for rehearing, we have ordered said opinion withdrawn and all orders entered pursuant thereto vacated and set aside.

A rule having been issued directing the respondent to show cause why a writ should not issue, the matter is now before us for consideration on the petition for a writ of mandamus, the respondent's answer thereto, including the exhibits attached to each, and the briefs and arguments of the respective parties, as well as the petition for rehearing and respondent's answer thereto, from all of which the following controlling facts appear:

> Filbrun's action against the petitioner railroad is a Federal Employers' Liability Act action for injuries alleged to have been received in a fall from a box car caused by a sudden release of a handbrake he was operating. Prior to its commencement in the District Court a substantially identical action filed by Filbrun against the petitioner in the Circuit Court of Cook County, Illinois was dismissed on the railroad's motion on the ground that the Circuit Court of Cook County "is an inconvenient and inappropriate forum". Fil-

1. 28 U. S. C. A. § 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

2. Filbrun is also referred to herein as "plaintiff".

brun did not appeal that determination. Instead he filed the United States District Court action and petitioner's motion for its transfer to the Western District of Michigan, Southern Division, pursuant to 28 U. S. C. A. § 1404(a) was denied by respondent.

Plaintiff selected the Circuit Court of Cook County, Illinois, in which to first file his personal injury suit against petitioner railroad, based on alleged injuries sustained by him at Ludington, Mason County, Michigan, which is about 60 miles from Grand Rapids, where a United States District Court sits. Respondent is a judge of the United States District Court which sits in Chicago, in Cook County, Illinois.

The jurisdiction of the district courts in federal employers' liability cases is concurrent with that of the state courts. 45 U. S. C. A. § 56.

On motion of defendant (petitioner here), the state court dismissed plaintiff's action on the ground that the Circuit Court of Cook County, Illinois, is an inconvenient and inappropriate forum. It also denied plaintiff's motion for reconsideration of its action. Plaintiff took no appeal from either order. Instead, plaintiff's suit on the same cause of action was filed in the same city and county of Illinois but in the United States District Court.

The dismissal in the Illinois state court was based upon the doctrine of *forum non conveniens*. Respondent was required by 28 U. S. C. A. § 1738 to give full faith and credit to the order entered by the state court. *Wayside Transportation Co.* v. *Marcell's Motor Express, Inc.*, 284 F. 2d 868, 870. This is especially true because it is a court of concurrent jurisdiction in administering the Federal Employers' Liability Act, as provided in that act, *supra*. Cer-

tainly if plaintiff had refiled his action in any state court in Cook County, it would have been dismissed on the basis of the Circuit Court's dismissal.

In applying the doctrine of *forum non conveniens,* the state court, pursuant to Illinois law, applied all of the tests set forth in 28 U. S. C. A. § 1404(a), which are (1) the convenience of the parties, (2) the convenience of the witnesses, and (3) the interest of justice. In applying that doctrine the state court was required additionally to determine whether plaintiff's selection of that court was dictated by a desire to vex and harass the petitioner. *Cotton* v. *L. & N. R. R. Co.*, 14 Ill. 2d 144, 166, 152 N. E. 2d 385, 396. While it made that additional finding, that fact is immaterial here because the district court did not have to wrestle with that question. Plaintiff was, however, bound by the doctrine of estoppel by verdict,[3] because, on all of the other tests applied by the state court, its decision was adverse to plaintiff. These matters were again raised before the district court under § 1404(a). Confronted by a final decision thereon by a court of concurrent jurisdiction, the district court had no discretion but to recognize the authoritative value of the state court's ruling, made in a case commenced there by plaintiff.

These reasons are sufficient upon which to grant the issuance of the writ requested. The transfer of this case to the federal district court 60 miles from plaintiff's home and the scene of his accident, and where many of the wit-

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3. In *Stangle* v. *Chicago, Rock Island and Pacific R. R. Co.*, 295 F. 2d 789, 791, we referred to a statement in regard to "estoppel by verdict" as announced in *Rose* v. *Dolejs*, 7 Ill. App. 2d 267, 275, 129 N. E. 2d 281, 285, as follows:

> "* * * 'estoppel by verdict or judgment, is but another branch of the doctrine of *res judicata*, and rests on the same principles as *res judicata*' * * *".

nesses are available to both litigants, all combine to establish that justice would there be accomplished.

The writ of mandamus will issue as prayed.

MANDAMUS GRANTED.

No. 13701.

CASTLE, *Circuit Judge*, dissenting.

I would deny the petition for mandamus. In my view of the matter the contested issues presented for determination are:

(1) Whether the state court's determination, made under the *forum non conveniens* doctrine, estops Filbrun from maintaining his action in a court sitting in Cook County, Illinois, and requires the District Court to allow the petitioner's motion to transfer the action to the Western District of Michigan, Southern Division; and if it does not,

(2) Whether, on the facts and circumstances presented, it is clearly established that the respondent's denial of the transfer sought constitutes an abuse of discretion.

The state court's determination was an application of the *forum non conveniens doctrine*. This required consideration of the same relevant factors as those to be considered in applying § 1404(a) (*Norwood* v. *Kirkpatrick*, 349 U. S. 29, 32) plus an additional and more stringent factor required by the Illinois decision governing the doctrine's application to F. E. L. A. cases (*Cotton* v. *Louisville and Nashville Railroad Company*, 14 Ill. 2d 144, 174, 152 N. E. 2d 385) that "only where it is shown that plaintiff is motivated purely by vexation and harassment will an F. E. L. A. case be dismissed" thereunder. Petitioner urges that be-

cause the state court's determination required consideration of all factors relevant to an application of § 1404(a) every point and question necessary to be passed upon in connection with its motion to transfer has already been adjudicated adversely to Filbrun. From this premise petitioner argues that Filbrun is estopped from relitigating those matters and that the full faith and credit provisions of 28 U. S. C. A. § 1738 require respondent to allow petitioner's motion to transfer.

The flaw in petitioner's contentions is that although the factors relevant to consideration of a motion to transfer under § 1404(a)—matters bearing on the convenience of the parties and witnesses, and the interest of justice—are all also relevant areas of inquiry, consideration of which is pertinent and necessary to a determination of the applicability of the *forum non conveniens* doctrine, those factors do not in the instant case involve identical material factual issues. Petitioner's contentions on this phase of the case confuse the ultimate conclusion and determination of the state court that it "is an inconvenient and inappropriate forum" with the material factual issues involved in that determination. A factual issue in the state court proceeding was whether the availability of a state forum at Ludington, Michigan (the county seat of Mason County) where the incident occurred, and where Filbrun and most of the witnesses resided,[1] as well as the availability of a federal forum

1. Subsequent to the fall, and his treatment and discharge by Ludington medical practitioners, Filbrun was hospitalized in Chicago where a laminectomy and spinal fusion was performed by a Chicago doctor to remedy a ruptured intervertebral disc. This Chicago orthopedic specialist would be Filbrun's chief medical witness. In addition, the medical and hospital records concerning the hospitalization, diagnosis, treatment and surgery are all located at Chicago as well as the roentgenologist and hospital staff who participated therein. Petitioner's occurrence witnesses are its own employees.

at Grand Rapids, Michigan, within some sixty miles of Ludington, when considered in the light of all other pertinent factors established that Filbrun's selection of the Circuit Court of Cook County at Chicago, Illinois, some three hundred miles from Ludington, was dictated purely by a desire to vex and harass the petitioner. But in resolving the issues involved in the motion to transfer the District Court action to the District Court at Grand Rapids the availability of a state forum at Ludington was not a factor which the respondent could consider. He could transfer the cause to a federal district court only—and the issues before him involved only the comparative convenience or inconvenience, and interest of justice, as measured by a choice between the District Court at Chicago, Illinois, and the District Court at Grand Rapids, Michigan. Thus, at least one material factual consideration was not identical in both proceedings.

The cases relied upon by the petitioner are therefore inapposite. In *Healea* v. *Verne*, 343 Ill. 325, 175 N. E. 562; *Chicago Title & Trust Co.* v. *National Storage Co.*, 260 Ill. 485, 103 N. E. 227 and *Hicks* v. *Hicks*, 20 Ill. App. 2d 139, 155 N. E. 2d 355, the estoppel recognized and applied, and in *Wayside Transportation Co.* v. *Marcell's Motor Express, Inc.*, 1 Cir., 284 F. 2d 868, the application of the mandate of 28 U. S. C. A. § 1738, was grounded on an attempt to relitigate the same material fact or issue which had been the subject of a prior adjudication in an action or proceeding involving the parties.[2]

In the instant case the prior adjudication involved and required consideration of a material fact—the availability of a state court forum at Ludington—which was not sub-

2. See also *Stangle* v. *Chicago, Rock Island and Pacific Railroad Company*, 7 Cir., 295 F. 2d 789, in which this Court approved an application of the doctrine of collateral estoppel.

ject to consideration in the subsequent proceeding. The test is not whether the same relevant factors or standards were applied in the determination of an issue but whether the same fact or question was determined. The question of the comparative convenience or appropriateness of the Ludington forum over a Chicago forum is not the same as the question of such relationship between a Grand Rapids forum[3] and a Chicago forum. In my opinion the determination of the Circuit Court of Cook County does not estop Filbrun from maintaining his action in the United States District Court for the Northern District of Illinois, Eastern Division, a permissible venue under the Federal Employers' Liability Act (45 U. S. C. A. § 56), nor circumscribe the District Court in the exercise of its judgment and discretion in determining petitioner's motion to transfer the cause to Grand Rapids.

This Court recognizes the availability of mandamus as a remedy to rectify a district court's abuse of discretion in the application of § 1404(a). *Chicago, R. I. & P. R. Co.* v. *Igoe*, 7 Cir., 212 F. 2d 378; *Blaski* v. *Hoffman*, 7 Cir., 260 F. 2d 317. But as was pointed out by then Chief Judge, F. Ryan Duffy, "something more must be shown than an erroneous decision by the District Court. We emphasize that an abuse of discretion must clearly appear." *Sypert* v. *Miner*, 7 Cir. 266 F. 2d 196, 199, citing *Chicago, Rock Island & Pacific R. Co.* v. *Igoe*, 7 Cir., 220 F. 2d 299, 304.

I have considered the representations made, and reviewed the affidavits tendered with the pleadings, concerning the witnesses who would be called and the nature of the testimony each would give. Without discussing this and the other pertinent factors in detail I deem it sufficient to ob-

---

3. Except that petitioner is suable there, Grand Rapids has no connection with the action.

serve that the respondent's determination of the issues and disposition of the motion involved a balancing of the comparative convenience and inconvenience to the parties and witnesses, and an appraisal of the likelihood of difficulty or expense in the procurement of attendance of witnesses, and the probability of need to resort to the use of depositions, as bearing on the interest of justice. Whether this Court would have reached the same conclusion is not important. In my opinion we cannot say that respondent has clearly abused the discretion he was called upon to exercise. Had it not been for the question of first impression precipitated by the estoppel and full faith and credit issues based on the state court determination, the petition for a writ of mandamus would have merited no more than the summary disposition called for by Judge Duffy's admonition in *Sypert* v. *Miner, supra* (p. 199), that:

> "Mandamus is a drastic and extraordinary remedy and petitions therefor hereafter filed in this Court which, in fact, involve only an erroneous decision will, in all likelihood, be summarily denied. Members of the Bar should not file petitions for mandamus in transfer cases unless they can make out a strong case of abuse of discretion."

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Friday, September 7, 1962

Before Hon. Elmer J. Schnackenberg, *Circuit Judge*, Hon. Latham Castle, *Circuit Judge*, Hon. J. Earl Major, *Circuit Judge*.

The Chesapeake & Ohio Railway Company, a Virginia Corporation, *Petitioner* vs. No. 13701 The Honorable James B. Parsons Judge of the United States District Court for the Northern District of Illinois, Eastern Division, *Respondent.*	Original Petition for Writ of Mandamus.

This matter comes before the Court on the petition of The Chesapeake & Ohio Railway Company for a writ of mandamus, the answer of respondent thereto, including the exhibits attached to each, and the briefs and arguments of the respective parties; as well as the petition for rehearing, and respondent's answer thereto. It is therefore ordered that said petition for rehearing be granted.

On consideration whereof, it is ordered and adjudged by this Court that the opinion of this Court filed on June 27,

1962, and all orders entered pursuant thereto be vacated and set aside.

It is further ordered and adjudged by this Court that a writ of mandamus issue directing Honorable James B. Parsons, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, to transfer, pursuant to the provisions of 28 U. S. C. A. § 1404(a), the cause entitled *Jack J. Filbrun* v. *The Chesapeake & Ohio Railway Company,* Civil No. 61 C 1174, from that Court to the United States District Court for the Western District of Michigan, Southern Division, sitting at Grand Rapids, Michigan.

A True Copy.

Teste:

KENNETH J. CARRICK,

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

Section 1404(a) of the Judicial Code of 1948, 62 Stat. 937, 28 U. S. C. 1404(a), provides:

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Section 1738 of the Judicial Code of 1948, 62 Stat. 947, 28 U. S. C. 1738, provides:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Section 6 of the Federal Employers' Liability Act As Amended, 35 Stat. 66, 45 U. S. C. 56, provides:

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 32

THE HONORABLE JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division,

Petitioner,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

CHARLES J. O'LAUGHLIN
HOLLAND C. CAPPER
Attorneys for Respondent

THOMPSON, RAYMOND, MAYER & JENNER
135 So. LaSalle Street
Chicago, Illinois
Of Counsel

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LA review 5-6881

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against him. The Court of Appeals held, in effect, that Filbrun was bound by the state court's final judgment that he could not litigate his action in Cook County, and therefore Petitioner was required to transfer the case upon the C & O's motion.

This decision is clearly correct. All issues required to be considered by Petitioner in passing on the C & O's motion had already been found against Filbrun by the state court. If Filbrun wanted to contest the correctness of the state court's final judgment against him on these issues his only remedy was appeal. He could not be allowed to succeed in his collateral attack upon the state court's judgment, which was the effect of Petitioner's refusal to order transfer. Otherwise an FELA plaintiff would be afforded multiple opportunities to contest the appropriateness of forums far distant from his home and place of accident. Filbrun wanted "... an encore" [*Angel* v. *Bullington*, 330 U.S. 183, 191 (1947)] and Petitioner gave it to him. The Court of Appeals correctly held he was not entitled to one.

The Court of Appeals found, and Petitioner does not seriously contest this finding, that if Filbrun had filed the same action in another state court in Cook County, his case would have been dismissed because of the conclusive determination of the Circuit Court that Cook County was an inconvenient and inappropriate forum. *Healea* v. *Verne*, 343 Ill. 325, 331-32, 175 N.E. 562, 565 (1931); *Chicago Title & Trust Co.* v. *National Storage Co.*, 260 Ill. 485, 493, 103 N.E. 277, 231 (1913). The full faith and credit provisions of 28 U.S.C. §1738 required Petitioner to give the same effect to the judgment of the Circuit Court of Cook County, Illinois, as would another state court in Cook County. *Wayside Transportation Co.* v. *Marcell's Motor Express, Inc.*, 284 F. 2d 868, 870-71 (1st Cir. 1960).

The decision of the Court of Appeals does not in any way divest the federal court of jurisdiction. It is but an application and reaffirmation of the sound, well settled doctrine that a party does not have the right to litigate the same question twice; ". . . that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U.S. 522, 525 (1931). *E.g., Chicago, Rock Island & Pacific R.R.* v. *Schendel*, 270 U.S. 611, 617 (1926).

The Court of Appeals' proper application of *res judicata*, as implemented by the full faith and credit statute, is not an event upon which certiorari need nor should be granted.

III.

This Court's Decision in Angel v. Bullington, 330 U.S. 183 (1947) Supports, Rather Than Conflicts, with the Opinion of the Court of Appeals.

Petitioner's contention that the opinion of the Court of Appeals is in direct conflict with *Angel* v. *Bullington*, 330 U.S. 183 (1947) is wide of the mark. That case does ***not*** hold ". . . that a plaintiff is not barred when some courts of the state are closed to him." (Petitioner's Petition, p. 8.) The holding, as Justice Frankfurter makes clear (330 U.S. at 189-90), is that a plaintiff who litigates in a state court his right to bring an action, where it is held that all the courts of the state are closed to him, cannot relitigate that same issue before a new forum in the same state even though, as here, that new forum is a United States District Court. Indeed, *Angel* v. *Bullington*, supra, seems clearly to support the decision of the Court of Appeals.

IV.

The Power to Grant Mandamus Is Not a Question Presented.

Rule 23 (1)(c) of this Court requires that this petition for certiorari be considered only upon the Question Presented or fairly comprised therein. The broadest reading of the Question Presented by Petitioner does not permit any contention concerning the power of the Court of Appeals to issue its writ of mandamus in this action. The question was not raised in the Court of Appeals at any time and is mentioned by Petitioner for the first time at page 8 of his Petition for Certiorari.

On the merits of the question, if such it is, it is clear that the Court of Appeals had power to grant mandamus in this action. *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957); *Chicago, Rock Island & Pacific R.R.* v. *Igoe*, 220 F. 2d 299 (7th Cir.), *cert. denied*, 350 U.S. 822 (1955).

CONCLUSION.

The decision of the Court of Appeals correctly applies the principles laid down in this Court's decisions and in the decisions of all other courts to the narrow question of *res judicata* involved in this case. No unsettled question of importance is presented. Certiorari should be denied.

Respectfully submitted,

CHARLES J. O'LAUGHLIN
HOLLAND C. CAPPER
Attorneys for Respondent.

THOMPSON, RAYMOND,
MAYER & JENNER
135 South LaSalle Street
Chicago 3, Illinois
RA 6-0220
Of Counsel.

APPENDIX.

ILL. REV. STAT. ch. 110, §77 (1961):

Judgments, decrees and orders subject to review—Leave to appeal from an order granting a new trial.

(1) Appeals shall lie to the Appellate or Supreme Court, in cases in which any form of review may be allowed by law, to review the final judgments, orders or decrees of the circuit court, the superior court of Cook County, the county courts, the city courts and other courts whose judgments, orders and decrees are reviewable therein, under such limitations and conditions as may be imposed by law and subject to rules.

(2) An appeal may be taken from an order granting a new trial on leave granted by the reviewing court, or by a judge thereof in vacation, on notice to adverse parties and petition presented to the reviewing court within 30 days after the entry of the order or within any extended period granted upon notice given and motion filed within the 30 days or any extensions thereof. Application for an extension of time shall be accompanied by such record and other documents as may be prescribed by rule. The ruling of the court upon a petition for leave to appeal from an order granting a new trial is not reviewable.

(3) Leave to appeal shall first be obtained only if expressly required by law. As amended by act approved July 19, 1955. L. 1955, p. 2238.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962

No. 32

THE HONORABLE JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division,

Petitioner,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

JOHN J. NAUGHTON,
205 West Wacker Drive,
Chicago 6, Illinois,
Attorney for Petitioner.

FRANKLIN-GREALY COMPANY, CHICAGO — 865

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 573

THE HONORABLE JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division,

Petitioner,

VS.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW AND JURISDICTION.

The opinion of the Court of Appeals is reported at 307 F. 2d 924. On motion of Petitioner the writ of mandamus was stayed by order of the Court of Appeals on October 4, 1962, to permit petition for certiorari. Otherwise, the statements in the petition as to the opinion below and the jurisdictional requirements are correct.

STATUTES INVOLVED.

In addition to the statutes set forth in the petition, ILL. REV. STAT. ch. 110, §77 (1961) is pertinent. This statute is in the appendix to this brief.

STATEMENT OF THE CASE.

In 1961, Jack J. Filbrun, a resident of Ludington, Michigan, filed an FELA action in the Circuit Court of Cook County, Illinois against the Respondent (hereafter "the C & O") seeking damages for an accident which occurred in Ludington, Michigan. The Illinois state court granted the C & O's motion to dismiss Filbrun's action for *forum non conveniens*. A petition for rehearing was denied. No appeal was taken.

Instead Filbrun filed the same action in the United States District Court for the Northern District of Illinois sitting within six blocks of the state court. The C & O moved to transfer the case under 28 U.S.C. §1404(a) to the United States District Court in Grand Rapids, Michigan, on the ground, among others, that the final judgment of the Circuit Court of Cook County required such transfer. Petitioner denied the C & O's motion.

The C & O then sued out an original petition for writ of mandamus in the Court of Appeals for the Seventh Circuit praying that Petitioner be compelled to transfer Filbrun's action. On June 27, 1962, that Court entered an order denying the petition. Thereafter, on rehearing, this order was vacated and set aside. A writ of mandamus issued directing Petitioner to transfer Filbrun's case to the United States District Court for the Western District of Michigan, Southern Division, Grand Rapids, Michigan, a court sitting within sixty miles of Filbrun's home and place of accident.

The Court of Appeals held that the principles of *res judicata* ("estoppel by verdict"), as implemented by the full faith and credit statute, 28 U.S.C. §1738, required this result.

ARGUMENT.

I.

The Petition for Writ of Certiorari Should Be Denied for Failure to Comply with Rule 23 of This Court.

The Petitioner's statements dwells at length upon matters which have no relevance to the Question Presented. This alone is sufficient reason to deny the petition for writ of certiorari. SUPREME COURT RULE 23 (4).

II.

The Decision of the Court of Appeals Correctly Applies the Law of Res Judicata as Implemented by the Full Faith and Credit Statute.

Filbrun, with full freedom to choose any one of a number of forums (45 U.S.C. §56), first brought his action in the Circuit Court of Cook County. That court, after consideration of detailed affidavits, counter-affidavits, written briefs, arguments and re-arguments, entered an order dismissing Filbrun's action for *forum non conveniens*. This was a final, appealable order. ILL. REV. STAT. ch. 110, §77 (1961); *Gaddis* v. *Nash*, 304 Ill. App. 259, 26 N.E. 2d 139 (1st Dist. 1940) (Abst.); *Jiffy Lubricator Co.* v. *Stewart-Warner Corp.*, 177 F. 2d 360, 362 (4th Cir. 1949) ("... a dismissal [for *forum non conveniens*] ... puts an end to the action and hence is final and appealable.").

Filbrun did not appeal. Instead he chose to file his same claim in the United States District Court for the Northern District of Illinois, thus attempting to relitigate the same issue upon which the state court had entered final judgment

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IN THE

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OCTOBER TERM, A. D. 1962.

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THE HONORABLE JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division,

Petitioner,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

OPINION BELOW.

The second Opinion of the Court of Appeals for the Seventh Circuit (R. 84-91) is reported at 307 F. 2d 924.

JURISDICTION.

The judgment of the Court of Appeals on rehearing was entered September 7, 1962 vacating the Court's denial of a writ of mandamus entered June 27, 1962, and entering a writ of mandamus compelling the transfer of an action under the Federal Employers' Liability Act to the United States District Court at Grand Rapids, Michigan. A Petition for Rehearing on the judgment of September 7. 1962 was denied by the Court of Appeals on October 4, 1962. The petition for a writ of certiorari was filed November 3, 1962 and was granted January 7, 1963. The jurisdiction of this Court rests on 28 U. S. C. § 1254 (1).

STATUTES INVOLVED.

Section 1404 (a) of the Judicial Code of 1948, 62 Stat. 937, 28 U. S. C. § 1404 (a), provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Section 1738 of the Judicial Code of 1948, 62 Stat. 947, 28 U. S. C. § 1738, provides:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Section 6 of the Federal Employers' Liability Act as Amended, 35 Stat. 66, 45 U. S. C. 56, provides:

> No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.
>
> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

QUESTION PRESENTED.

Whether full faith and credit requires a district court on a motion to transfer under 28 U. S. C. § 1404 (a) to transfer an action brought under the Federal Employers' Liability Act that had previously been dismissed by a state court in the same district on the ground that it "was an inconvenient and inappropriate forum".

STATEMENT OF THE CASE.

This case arises out of a cause of action brought on behalf of a plaintiff who was, and is, a resident of Ludington, Michigan. The case involves only the question of the ruling of the United States District Court in denying a motion to transfer that cause of action to Grand Rapids, Michigan on the motion of the respondent brought under the provisions of 28 U. S. C. § 1404 (a). The Court of Appeals in its second Opinion issued a writ of mandamus compelling the transfer sought by respondent.

The underlying cause of action grew out of facts in which the plaintiff was injured while employed by the railroad in its East Yard in Ludington on July 15, 1960. He was operating a hand brake on a box car when it suddenly released and threw him to the ground. Preceding the instant suit in the District Court, plaintiff filed an action in the Circuit Court of Cook County. The railroad filed a motion to dismiss on the ground that the Circuit Court of Cook County was an inconvenient and inappropriate forum (R. 10-20). That Court dismissed the action on the ground that it "was an inconvenient and inappropriate forum" (R. 27).

Plaintiff then filed the action involved herein in the District Court in Chicago on July 11, 1961. On August 23, 1961, the Respondent filed its Motion to Transfer under 28 U. S. C. § 1404 (a) (R. 43-53).

The railroad's Motion to Transfer was denied on December 7, 1961 and it was given 30 days to Answer (R. 60). On January 10, 1962, the railroad filed its Answer which stated that it was without knowledge or information sufficient to form a belief as to the truth of the plaintiff's allegation that while he was attempting to release the hand

brake, it suddenly and violently released causing him to fall from the car (R. 71, 39).

On February 9, 1962, the railroad was granted a rehearing of its Motion to Transfer on its petition (R. 61, 62). Oral argument was heard and briefs were submitted on the rehearing. The Motion to Transfer, on rehearing, was denied on March 20, 1962 (R. 63).

On such facts, the Court of Appeals first handed down an Opinion denying the writ of mandamus sought by the railroad (R. 75-82). On rehearing, that Court set aside its previous Opinion and issued the writ of mandamus based on its conclusion that Petitioner was without discretion and was required to recognize the decision of the Circuit Court of Cook County and was, therefore, required to transfer the case to the United States District Court at Grand Rapids, Michigan (R. 84-91). In accordance with this Opinion, the Court of Appeals issued a writ of mandamus on September 7, 1962 compelling Petitioner to transfer the cause (R. 91, 92). Rehearing was denied on October 4, 1962 (R. 92). On October 23, 1962, the execution of the judgment of mandamus was stayed for a period of 30 days from October 4, 1962, and until final disposition by the Supreme Court of the United States if a petition for certiorari was filed within the 30 day period (R. 93). There is no suggestion in any of the Opinions of the Seventh Circuit that the Petitioner here in any way abused his discretion in ruling upon the Motion to Transfer under 28 U. S. C. § 1404 (a).

This Petition seeks a review only of the Opinion and Order divesting Petitioner of all discretion and of any power to consider the Motion to Transfer in accordance with the provisions of 28 U. S. C. § 1404 (a).

SUMMARY OF ARGUMENT.

The basic federal question is whether error was committed by the court below when it held that Petitioner was required to transfer this case because a state court had previously exercised its discretion and dismissed the same cause of action. The only other case involving subject matter remotely similar suggests that a contrary result might occur. *Rodriguez* v. *Pan American Life Insurance Co.*, 5th Cir., 311 F. 2d 429, 433, 434 (1962). The authority relied on by the court below does not support its dicision because it is solely based on *res judicata*; full faith and credit is involved only to the extent that it implements *res judicata*. *Wayside Transportation Co.* v. *Marcell's Motor Express, Inc.*, 1st Cir., 284 F. 2d 868, 870.

Respondent relies on *res judicata* but the court below did not. *Res judicata* is inapplicable since a final judgment is not involved. *Merriam* v. *Saalfield*, 241 U. S. 22, 28. Indeed, no one has so suggested. Petitioner accorded comity to the judgment of dismissal; nothing more was required.

The court below erroneously divested Petitioner of discretion vested in him by Congress. The court ignored the material factual differences in the two motions as well as the applicable Illinois law in so ruling. That the Petitioner and the state court were courts of concurrent jurisdiction is irrelevant.

No authority has been provided for the assertion that other state courts in Cook County would have dismissed. The assertion is irrelevant since all courts must be barred before the party can be foreclosed from litigating a federal question in the federal courts. *Angel* v. *Bullington*, 330 U. S. 183, 190, 191.

The judgment below deprives the federal court of territorial jurisdiction bestowed by Congress. Mandamus was granted to obliterate Petitioner's discretion despite the broad discretion vested in Petitioner to decide the federal Motion to Transfer. *Norwood* v. *Kirkpatrick*, 349 U. S. 29, 33. The question decided by the Circuit Court of Cook County ignores the sole question presented by the applicable Illinois law. *Cotton* v. *L. & N. R. Co.*, 141 Ill. 2d 144, 152 N. E. 2d 385. The substantial difference in the nature of the two motions precludes the holding below. The fact that plaintiff did not appeal the discretionary order of the state court does not prevent him from exercising his federal right to a choice of forum.

The doctrine of estoppel by verdict is not applicable since there was no final judgment in the state court. Indirect estoppel by verdict is inapplicable because the same cause of action was involved in both forums. *Cromwell* v. *Sac County*, 94 U. S. 351.

Reason and common sense are offended by the result below. Policy considerations should be in accord with the reasonable expectations of the courts and litigants. The better rule would allow the second forum to decide the question with consideration being given to the prior ruling, even though the questions be identical. *Remington* v. *Central P. R. Co.*, 198 U. S. 95, 99, 100. Such a rule is particularly appropriate when a federal right is asserted in a federal forum. 45 U. S. C. § 56, 35 Stat. 66.

ARGUMENT.

The Writ of Mandamus Issued by the Court Below Is Based on a Misinterpretation of the Requirements of Full Faith and Credit and Divests the Federal Courts of Jurisdiction Granted by Congress.

The question of Federal law decided by the Court below is whether or not full faith and credit requires the federal courts to ignore federal laws and to transfer a case arising under the Federal Employers' Liability Act solely because a state court, in the exercise of its discretion, had previously dismissed the same case on its finding that it ". . . was an inconvenient and inappropriate forum" (R. 27).

This basic question is unique because no other court has stretched the doctrine of full faith and credit to cover circumstances remotely similar. The only other case dealing with a similar point, *Rodriguez* v. *Pan American Life Insurance Co.*, 5th Cir., 311 F. 2d 429 (1962), suggests that a completely opposite result might occur. In that case, the district court dismissed an action by Cuban refugees on the ground of *forum non conveniens* on its reasoning that the Courts of Cuba were available. On appeal the dismissal was reversed. The Insurance Company suggested that the dismissal could be justified on the ground that Louisiana Courts were available; the *forum non conveniens* having been situated in Florida. The Court rejected this contention and stated at 311 F. 2d 433, 434:

> ". . . Indeed, we think it appropriate to note that should this defendant prevail on this dismissal, there is no assurance that a whole new round of jurisdictional jousting would not be open to invitation. If plaintiffs be required to go now to the Louisiana courts it is not

illogical to assume that defendant could there, once again, invoke the doctrine of *forum non conveniens* on the ground that the Florida courts would be convenient. That is where the plaintiffs started, but still no court would have touched the merits of the claim. Their quest for legal determination of their rights under contract with defendant should be answered."

When the Opinion below is carefully examined, it is clear that the decision concerns full faith and credit only insofar as it implements the doctrine of *res judicata*. This is conceded by Respondent in its Brief in opposition to the petition for writ of certiorari when it states that the Opinion below presents ". . . the narrow question of *res judicata* . . ." (p. 6). The only case cited by the Court below is the case of *Wayside Transportation Co.* v. *Marcell's Motor, Inc.*, 1st Cir., 284 F. 2d 868, 870. In that case, the suit had been brought in a state court in Vermont. Defendant there contested jurisdiction of the person, lost, and did not appeal though the question was certified to the Supreme Court of Vermont before trial. After defendant failed to appear at several pre-trial conferences specially set, a default judgment was entered. When the defaulting defendant sued on the same cause of action in a Massachusetts district court, the default judgment was pleaded in a counterclaim and sustained by the federal court. The Court of Appeals, of course, affirmed the judgment since it is well established law that a person or party who contests jurisdiction and loses on that issue must appeal. As the Court of Appeals there points out, there was no necessity to appear in the Vermont action since the question of jurisdiction was open to litigation in a suit to enforce any judgment obtained. The case is in no way applicable to the present factual situation. That case is based solely on the doctrine of *res judicata*. It is true that full faith and credit implements

that doctrine in the case, but the case would be decided in the same manner absent any application of full faith and credit.

Respondent seeks to justify the judgment here as a correct application of the law of *res judicata* as implemented by the full faith and credit statute (Brief of Respondent in Opposition, p. 3). The Court of Appeals, however, relied exclusively on the full faith and credit language in *Wayside Transportation Co.* v. *Marcell's Motor Express, Inc.*, 1st Cir., 284 F. 2d 868, 870 and did not mention *res judicata*. The doctrine of *res judicata*, moreover, applies only to a final valid judgment. *Merriam* v. *Saalfield*, 241 U. S. 22, 28.

Respondent's reliance on *res judicata* is without merit since the Circuit Court of Cook County entered a mere judgment of dismissal and no one has suggested that plaintiff is not entitled to a determination on the merits of his cause of action; the only question being whether such determination should be had in the district court at Grand Rapids, Michigan or before the Petitioner in Chicago, Illinois. In considering the previous dismissal, Petitioner gave respectful consideration to the finding by the Circuit Court of Cook County that it ". .. was an inconvenient and inappropriate forum" (R. 27) and to Respondent's contention, first raised on rehearing, that full faith and credit must be accorded the order of dismissal but decided that comity did not require the transfer and that full faith and credit did not apply. In so deciding, Petitioner also found that the material factual issues were different in the two motions as pointed out in the dissenting opinion (R. 87-91). Petitioner states that he decided the motion under the standards set out in 28 U. S. C. § 1404 (a), 62 Stat. 937, and further decided that Respondent had failed to meet its burden even when aided by the previous judgment of dismissal.

The court below, however, was not satisfied with Petitioner's exercise of discretion and erroneously held that Petitioner had no discretion, could not consider the motion to transfer, and was required to transfer to the forum suggested by Respondent. In so doing, the court erroneously relied on *Wayside Transportation Co.* v. *Marcell's Motor Express, Inc.*, 1st Cir., 284 F. 2d 868, 870 as requiring that full faith and credit be given "... to the order entered by the state court." (R. 86). No consideration is given to the Illinois law that a decision as to a dismissal on the ground of *forum non conveniens* lies primarily within the discretion of the trial court or to the judicial notice taken by the Supreme Court of Illinois that a serious court congestion problem exists in the state courts in Cook County, *Cotton* v. *L. & N. R. Co.*, 14 Ill. 2d 144, 152 N. E. 2d 385, 392, 398. See also *Secco* v. *Chicago Transit Authority*, 2 Ill. App. 2d 239, 119 N. E. 2d 471, where judicial notice was taken by the appellate court in 1954 that the time from filing suit until trial of practically all personal injury cases was 3½ to 4 years.

Despite the discretionary nature of the order and despite the current status of the dockets of the United States District Court in Chicago, the court below ignores all differences and states that a special reason exists for its decision in that the state court and the federal court are courts of concurrent jurisdiction in administering the Federal Employers' Liability Act (R. 86). In the case of *Supert* v. *Miner*, 7th Cir., 266 F. 2d 196, the same circuit held that a federal judge had the right to order a cause of action transferred after a judge of the same court had previously denied the same motion to transfer, stating at 266 F. 2d 198:

> "Implicit in the doctrine of *res judicata* is a final judgment. In the case at bar no final judgment has been entered. We hold Judge Miner had the power and the right to entertain the second motion for transfer."

In another attempt to buttress its judgment, the court below states that if plaintiff had refiled his action in any state court in Cook County it would have been dismissed on the basis of the Circuit Court's dismissal. No authority is given for this conclusion and Respondent has not met its burden of establishing such proposition. But even if true, such fact is irrelevant and wrongfully and erroneously divests the federal court of jurisdiction granted by Congress for the express purpose of extending the jurisdiction of the federal courts beyond the territorial limits of the county in which the federal court sits. Moreover, the Opinion of the Court of Appeals, in inferring and imposing such dismissal, directly conflicts with the Opinion of this Court in *Angel* v. *Bullington*, 330 U. S. 183, 190, 191 which squarely holds that a plaintiff is not barred from litigating in the federal courts unless, and until, it has been finally decided that all of the courts of the state in which he brought his preceding litigation are closed to him. This Court there states the converse of the Court of Appeals proposition and holds that a plaintiff is not barred when only some of the courts of the state are closed to him. Moreover, the court below not only ignores such holding but does so in a case arising under federal law and not by virtue of diversity of citizenship.

The basic error in the equating of the federal court with a county court is seen when a hypothetical case is considered. Assuming that the same injury was sustained by the plaintiff in an occurrence in East Chicago, Indiana, it is plain that the removal of any discretion from the District Court would require the court to transfer the suit to a federal court in Indiana. This would be true even though the place of the accident would be well within the 100 miles within which a federal court may issue a subpoena for trial under the provisions of Rule 45 (e) (1) of the Federal Rules of Civil Procedure. Thus, the decision below would deprive

the federal courts of territorial jurisdiction granted by Congress as well as prevent the determination of the differing questions raised by the federal motion to transfer.

Despite the differences in the material factual issues and in the territorial jurisdictions of the courts here involved, the writ of mandamus was issued in perpetuation of the present conflict between the circuits as to whether such a writ lies, and despite the express reservation of that question in *Norwood* v. *Kirkpatrick*, 349 U. S. 29, 33. (This express reservation was pointed out to the court below in my Brief despite Respondent's disclaimer in its Brief opposing the granting of certiorari, p. 6). Moreover, the Court of Appeals issued the writ not to correct an abuse of discretion in applying the principles as stated in 28 U. S. C. § 1404 (a), 62 Stat. 937, but to order the cause transferred without any consideration of the federal questions raised by the Motion to Transfer filed by the railroad. This is done despite the clear intent of Congress to invest the District Court with a broad discretion on motions to transfer and, specifically, to decide questions relating to the convenience of the parties, the convenience of the witnesses, and the interest of justice. This Congressional intention is confirmed by this Court in *Norwood* v. *Kirkpatrick*, 349 U. S. 29, 33. (The court below, nevertheless, obliterated all discretion, whether broad or narrow, in the circumstances of this case). The discretion vested in the District Court, moreover, is much broader than the applicable law binding the Circuit Court of Cook County. The state law is stated in *Cotton* v. *L. & N. Railroad Company*, 14 Ill. 2d 144, 152 N. E. 2d 385 where the Supreme Court of Illinois held that the issue of the motivation of the plaintiff is the only issue for determination on a Motion to Dismiss on the ground of *forum non conveniens*, stating that only where an FELA plaintiff is motivated purely by vexation and harassment may an Illinois state

court dismiss his action. Thus the Circuit Court was required to base its determination on its finding as to the state of mind of the plaintiff in filing his law suit but instead based its determination on its sole finding that it "was an inconvenient and inappropriate forum". (It is interesting to note that the order of dismissal ignores the only question in such a case (R. 27) though the railroad claimed such "vexation and harassment" in its Motion to Dismiss (R. 13).). The governing principles are therefore seen to be so diverse that no basis whatsoever is provided for the holding of the Court of Appeals.

The Opinion of the Court of Appeals also relies on the fact that the plaintiff took no appeal from the dismissal of his cause of action in the state court. In so doing, the decision wrongfully and erroneously establishes a non-existent doctrine of the exhaustion of judicial remedies which would compel plaintiffs to appeal discretionary orders of state courts or suffer the peril of being barred from enforcing the right to a choice of forum granted FELA plaintiffs in Section 6 of the Federal Employers' Liability Act, 45 U. S. C. § 56, 35 Stat. 66, because of the misapplication and expansion of full faith and credit by the court below.

The court below also relied on the doctrine of estoppel by verdict to buttress its conclusion that full faith and credit barred all consideration of the standards of 28 U. S. C. § 1404 (a), 62 Stat. 937. Such reliance was a misapplication because the order of the Circuit Court did not constitute a final judgment but, instead, was a mere dismissal. Moreover, estoppel by verdict arises only when the party estopped is involved in a suit on a different cause of action and is squarely limited to the questions actually determined by the original action and not to what might have been litigated and determined. *Cromwell* v. *Sac County*, 94 U. S.

351; *Baltimore S. S. Co.* v. *Phillip*, 274 U. S. 316, 319. See *Stangle* v. *Chicago, Rock Island & Pacific R. Co.*, 7 Cir., 295 F. 2d 789, relied on below, in which the doctrine was properly applied in a suit on a different cause of action.

Considered apart from prior decisions, the result below does not commend itself in an orderly administration of justice. The full faith and credit statute; 28 U. S. C. § 1738, 62 Stat. 947; does not provide for recognizing usage or law in a single county of a state but requires a state-wide effect. In addition, neither reason nor common sense would suggest that a plaintiff should be required to appeal discretionary dismissals at the risk of being bound thereby in a different forum. When so held, the court hearing the original motion to dismiss is granted a power, and its order is given an effect, which was never contemplated at the time of the original order. The general policy favoring *res judicata* is surely based on the premise that all parties should contemplate that a final judgment on the merits should end all discussion of the cause of action. But, in the present situation, there should be no policy which would prevent any plaintiff, and especially a Federal Employers' Liability Act plaintiff, from having his right to a federal forum determined by federal statutory standards. The ruling below is fundamentally erroneous in its holding that Petitioner did not abuse his discretion but that instead he did not possess any discretion whatsoever. Such fundamental error is compounded by the fact that a *forum non conveniens* motion addresses itself to problems such as court congestion which which must always be *sui generis* with the court deciding the motion.

The better rule is that the second forum should be free to decide the matter with due consideration given to the prior ruling. This is true even though the questions are identical.

Such a rule was followed in *Brainard* v. *Atchison, Topeka & Santa Fe Ry. Co.*, U. S. D. Ct., Kan., 87 F. Supp. 921 where a prior ruling when the case was in the U. S. District Court in Chicago was re-examined. This general law on the freedom to re-examine interlocutory orders seems far preferable to the binding restrictions placed on Petitioner by the court below. The rule in so treating interlocutory orders is succinctly stated in *Remington* v. *Central P. R. Co.*, 198 U. S. 95, where the state court decided that it had jurisdiction of the person of the defendant, an appeal was taken from that order, and the case was removed to the federal court before the appeal was passed upon. The federal court then re-examined the ruling and held that it did not have jurisdiction over the person and dismissed the suit. This Court affirmed stating through Mr. Justice Holmes at 198 U. S. 99, 100:

> "It is said that the decision of the state court, although appealed from, was *res judicata*. But it stood no higher than a similar decision made by the circuit court, if the case had been begun before that court.
>
> It may be that the defendant would have had no right to renew its motion, but the circuit court would have had had power to give it leave. If the circuit court was satisfied that it, or its predecessor the state court, had made a mistake, it had power to reopen the matter. It did so, and its action in that respect is not open to question here. However stringent may be the practice in refusing to reconsider what has been done, it still is but practice, not want of jurisdiction, that makes the rule."

Such a rule seems particularly appropriate in the circumstances of this case since plaintiff here asserts a federal right which is governed by the Opinions of the federal courts. In the case below, the plaintiff sought only such a determination which was granted by Petitioner. The effect

of the Opinion of the Court of Appeals is to take these matters out of the hands of the federal courts and to require a federal court, sitting in a federal action, to sit as a federal court does in an action brought in its court by virtue of diversity of citizenship. As to such cases, there are many qualifications to the general rule that a federal court sitting in diversity sits as another state court. Until the Opinion below, there was no qualification to the general rule that a federal court sitting in an action brought under federal law was governed solely by federal and not by state law.

CONCLUSION

For the reasons adverted to above and because of the demands of the law and substantial justice, the judgment of the Court of Appeals for the Seventh Circuit granting a Writ of Mandamus should be reversed.

Respectfully submitted,

JOHN J. NAUGHTON,
205 West Wacker Drive,
Chicago 6, Illinois,
STate 2-5925,
Attorney for The Honorable James B. Parsons, United States District Judge, Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1962

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THE HONORABLE JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division,

Petitioner,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT

CHARLES J. O'LAUGHLIN
HOLLAND C. CAPPER
Attorneys for Respondent

PHILIP W. TONE
THOMPSON, RAYMOND, MAYER & JENNER
135 So. LaSalle Street
Chicago, Illinois
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 573

THE HONORABLE JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division,

Petitioner,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT

OPINION BELOW AND JURISDICTION.

The statements in the Brief for Petitioner are satisfactory.

STATUTES INVOLVED.

In addition to the statutes set forth in the Brief for Petitioner the following are pertinent:

FED. R. CIV. P. 41 (a) (1)
62 Stat. 882 (1948), 68 Stat. 11 (1954), 75 Stat. 83 (1961), as amended, 28 U.S.C. §102 (b)(1).
62 Stat. 895 (1948) 28 U.S.C. §132 (a).
62 Stat. 897 (1948), 28 U.S.C. §141.
62 Stat. 898 (1948), 76 Stat. 762, as amended, 28 U.S.C. §142.
62 Stat. 939 (1948), 28 U.S.C. §1445 (a).
62 Stat. 944 (1948), 63 Stat. 102 (1949), as amended, 28 U. S. C. §1651 (a).
ILL. REV. STAT. ch. 110, §77 (1961)

The pertinent text of these statutes is set forth in the appendix to this brief.

QUESTIONS PRESENTED.

(1) Where a state court has entered a final judgment dismissing an FELA plaintiff's action for *forum non conveniens* what effect must a United States District Court (sitting in the same city) give that judgment upon a motion to transfer an identical action subsequently brought?

(2) Does mandamus lie to protect a party's right not to have to relitigate an issue conclusively determined between the parties in a prior action?

(3) Alternatively, does mandamus lie to correct Petitioner's abuse of discretion in failing to transfer a case which had previously been dismissed for *forum non conveniens* by a state court sitting in the same city?

STATEMENT OF THE CASE.

Because in Respondent's judgment Petitioner's brief is incomplete and distorts the case in what is presented, a restatement of the case is desirable.

In 1961, Jack J. Filbrun, a resident of Ludington, Michigan, filed an FELA action in the Circuit Court of Cook County, Illinois against the Respondent seeking damages for personal injury from an accident which occurred in Ludington, Michigan (R. 6-8). Respondent promptly moved for dismissal on the grounds of *forum non conveniens.* The motion was granted (R. 10-20, 27). A petition for rehearing was denied (R. 30-34, 35). No appeal was taken (R. 85).

Instead Filbrun filed the same action in the United States District Court for the Northern District of Illinois sitting but a few city blocks from the courthouse for the Circuit Court (R. 36-40). Respondent moved under 28 U.S.C. §1404(a) to transfer the case to the United States District Court for the Western District of Michigan, Southern Division, in Grand Rapids, Michigan, on the ground, among others, that the final judgment of the Circuit Court of Cook County required such transfer (R. 41-53). Petitioner denied Respondent's motion (R. 60). A petition for rehearing (R. 61-62) received the same fate (R. 63).

Respondent then sued out an original petition for writ of mandamus in the United States Court of Appeals for the Seventh Circuit praying that Petitioner be compelled to transfer Filbrun's action (R. 1-5). On June 27, 1962, that Court entered an order denying the petition (R. 83). Thereafter, on rehearing, this order was vacated and set aside and an order entered directing that a writ of mandamus issue as prayed by Respondent (R. 9-92).

The Court of Appeals, with one judge dissenting, held that the principles of *res judicata* ("estoppel by verdict"), as implemented by the full faith and credit statute, 28 U.S.C. §1738, required this result (R. 84-87).

SUMMARY OF ARGUMENT.

I. Filbrun first chose to bring suit in the Circuit Court of Cook County. That Court entered a final, appealable order dismissing his action on the grounds of *forum non conveniens*. Under Illinois law this dismissal was a finding that Cook County was an inconvenient forum and that Filbrun was motivated purely by vexation and harassment. The state court, in reaching this conclusion, was required to pass upon each point and question required to be considered upon a motion to transfer, and more. Accordingly this judgment was *res judicata* on all issues raised by Respondent's motion to transfer Filbrun's action under §1404(a). Common law principles of *res judicata* estopped Filbrun from relitigating the issues which were conclusively determined against him by the state court. Therefore, Petitioner was required to give effect to the final judgment of the state court by transferring Filbrun's action to a more convenient and appropriate forum.

II. The full faith and credit statute required Petitioner to give the same effect to the final judgment of the state court as would another state court sitting in Cook County. Under Illinois law of *res judicata* ("estoppel by verdict") any other Illinois state court sitting in Cook County would have dismissed Filbrun's subsequent action on the basis of the judgment of the Circuit Court. When confronted with Respondent's motion, Petitioner was required to give the judgment of the Circuit Court the same respect as would an Illinois Court.

III. Alternatively, Petitioner grossly abused his discretion in failing to transfer Filbrun's action to a more appropriate and convenient forum. The convenience of the parties, the convenience of the witnesses, and the interest of justice, when considered in light of the fact that the Circuit Court of Cook County had previously dismissed the same action between the same parties for *forum non conveniens*, all combined to require transfer. Coupling this with the fact that failure to transfer would foreclose Respondent from presenting the testimony in person of the seven doctors who examined and treated Filbrun immediately following his accident, it is clear that Petitioner grossly abused his discretion.

IV. There is no question that the Court of Appeals had the power to issue its writ of mandamus. The issue is whether the facts and circumstances of this particular case warranted the exercise of this extraordinary remedy. There is no division in the Federal courts that mandamus lies to protect a party's right not to have to relitigate issues conclusively determined in another court. In this instance the writ lies to protect a right essential to the working of the judicial process just as it also lies to protect the right to jury trial, the right to trial by judge instead of master, and the right not to be subjected to gross abuses of judicial power.

Alternatively, mandamus was the appropriate remedy to correct Petitioner's gross abuse of discretion. Although there is a difference in emphasis in the Courts of Appeals as to the circumstances which must be present in a §1404(a) case before mandamus will issue, there is no question of the power to issue the writ in a proper case. Petitioner's failure to give any effect to the state court order, coupled with the inconvenience to the parties and witnesses and the injustice of trial in a forum sitting in Cook County, constituted such a denial of the rights of Respondent as to warrant correction by mandamus.

ARGUMENT.

I. THE FINAL JUDGMENT OF THE STATE COURT REQUIRED TRANSFER OF FILBRUN'S ACTION UNDER COMMON LAW PRINCIPLES OF RES JUDICATA.

The Circuit Court of Cook County, where Filbrun first filed suit, after consideration of detailed affidavits, counter-affidavits, written briefs, arguments and re-arguments, entered an order dismissing Filbrun's action for *forum non conveniens*. This was a final, appealable order. ILL. REV. STAT. ch. 110, §77 (1961); *Gaddis* v. *Nash*, 304 Ill. App. 259, 26 N.E. 2d 139 (1st Dist. 1940) (Abst.); *Jiffy Lubricator Co.* v. *Stewart-Warner Corp.*, 177 F. 2d 360, 362 (4th Cir. 1949) (". . . a dismissal [for *forum non conveniens*] . . . puts an end to the action and hence is final and appealable.").

Filbrun did not directly attack that judgment by appeal. Instead he chose to collaterally attack that judgment by instituting suit in the United States District Court for the Northern District of Illinois. The Court of Appeals held, in effect, that Filbrun was bound by the state court's final judgment that he could not litigate his action in Cook County, and therefore Petitioner was required to transfer the case upon Respondent's motion.

This decision is clearly correct. All issues required to be considered by Petitioner in passing on Respondent's motion had already been found against Filbrun by the state court. If Filbrun wanted to contest the correctness of the state court's final judgment his only remedy was appeal. Filbrun wanted ". . . an encore" [*Angel* v. *Bullington*, 330 U.S. 183, 191 (1947)] and Petitioner gave it to him. The Court of Appeals correctly held he was not entitled to one.

Res judicata literally means "matter adjudged". In the terminology of the RESTATEMENT OF JUDGMENTS §45, *comment d*, the branch of *res judicata* which is involved in this case is called "direct estoppel". The RESTATEMENT is clear and concise on this point:

> "Direct estoppel. Where an issue is actually litigated and determined in an action, the determination is conclusive in any subsequent action between the parties based upon the same cause of action. Ordinarily, after a judgment is rendered in an action, the cause of action is extinguished by the judgment, and it is immaterial what issues were actually litigated. Where, however, a judgment for the defendant is not upon the merits, the plaintiff is not precluded from maintaining an action on the same cause of action; but in such a case *the matter actually litigated and determined in the action is res judicata, and is binding upon the parties in a subsequent action based upon the same cause of action* (see §49, Comment b). The term 'direct estoppel' is used in the Restatement of this Subject to indicate that the binding effect of a judgment as to matters actually litigated and determined in one action applies to a subsequent action between the parties based upon the same cause of action, where the plaintiff is not precluded from maintaining such an action by the extinguishment of his cause of action under the rules as to merger and bar." RESTATEMENT OF JUDGMENTS §45, *comment d* (1942) (emphasis added). See also RESTATEMENT OF JUDGMENTS §49, *comment b*.

The matter ". . . actually litigated and determined" in the state court action was whether Filbrun should be allowed to litigate his cause of action in a Cook County forum. The state court conclusively held that he should not be allowed to do so. That final judgment should preclude subsequent trial of the same cause of action in the United States District Court sitting within a few blocks of the state forum.

Petitioner argues that the judgment of the state court was not final because it was "a mere judgment of dismissal" (Brief, p. 10) and not a determination on the merits. Petitioner's position is not supported by any authority. Indeed the authorities are unanimously against this unusual contention:

> "A judgment may be final although it does not finally determine the controversy between the parties with reference to the subject matter. Thus, a judgment for the defendant may be a final judgment, although it is not a judgment on the merits and does not preclude the plaintiff from maintaining a second action against the defendant on the same cause of action." RESTATEMENT OF JUDGMENTS §41, *comment b* (1942).
>
> ". . . [T]o borrow Mr. Justice Brandeis' famous phrase, 'final' also is 'a word of many meanings'; the law of judgments does *not* use it in relation to conclusiveness . . . to mean only a judgment 'which ends the litigation . . . and leaves nothing for the court to do but execute the judgment' . . ." *Lummus Co.* v. *Commonwealth Oil Refining Co.*, 297 F. 2d 80, 89 (2d Cir. 1961), *cert. denied*, 368 U.S. 986 (1962) (Friendly, J.) (emphasis added).

The real issue in this case, and one which Petitioner unfortunately largely ignores, is whether the judgment of the state court was determinative of the "key ingredient" [*Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 347 U.S. 89, 100 (1954)] involved in the motion to transfer. Respondent submits that the judgment clearly was so determinative. In analyzing this issue cases involving "collateral estoppel by judgment" (different cause of action) are equally as helpful as "direct estoppel" cases (same cause of action) and indeed the Illinois state courts and

the United States Courts of Appeals often use the term "estoppel by verdict" or "collateral estoppel" to cover both situations. *Clarke Baridon, Inc.* v. *Merritt-Chapman & Scott Corp.*, 311 F.2d 389, 396 (4th Cir. 1962); *Rose* v. *Dolejs*, 7 Ill. App. 2d 267, 275, 129 N.E. 2d 281, 285 (2d Dist. 1955). In each situation the rule is the same that only those matters directly placed in issue by the parties and actually decided by the court in the former litigation are binding between the same parties in subsequent litigation whether in the same cause of action (as here) or in a different cause of action. *Cromwell* v. *County of Sac*, 94 U.S. 351 (1876); Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 3 (1942) (". . . matters actually litigated and determined in the prior action cannot be relitigated in the later action.") An Illinois court has approved the following method of determining what has actually been decided in the prior action:

> ". . . [W]hen a matter, usually of fact but sometimes of law, is once decided between the parties . . . that determination is binding in a subsequent suit where that particular matter is again in issue between the same parties, even though the cause of action is not the same. 'Here we find the courts limiting the rule most scrupulously to what was in fact litigated and decided in the former proceeding, and for that purpose referring to pleadings, testimony, jury instructions, finding, verdicts and any other pertinent source of information sensibly helpful to the inquiry. Unless it does affirmatively appear that the matter was actually raised and passed upon, then it may be litigated in the case now on trial. The inquiry is factual and common-sense. The might-have-beens are left strictly out of the picture.' Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339, 342 (1948)." *Cohen* v. *Schlossberg*, 17 Ill. App. 2d 320, 330, 150 N.E. 2d 218, 223 (1st Dist. 1958).

Taking this approach to determine the "matters actually litigated and determined" in the state court, a study of the record shows that almost identical affidavits were presented to Petitioner as had been presented to the state court (Compare R. 47-53 and 54-59 with R. 14-20, 25-26, and 31-33); almost identical motions were presented (Compare R. 43-47 with R. 10-14); and in addition the state court had Filbrun's answer to the motion to dismiss. (R. 21-24). These pleadings and documents frame the factual issues determined by the state court in reaching its ultimate conclusion that Filbrun's action should be dismissed for *forum non conveniens*. Under Illinois law it is clear that the state court was required to, and did, consider and adjudicate every point and question necessary to be passed upon in connection with a §1404(a) motion to transfer. *Cotton* v. *Louisville & Nashville R. R.*, 14 Ill. 2d 144, 174, 152 N.E. 2d 385 (1958). Indeed that case makes it apparent that the standards of decision applied by the state court in dismissing for *forum non conveniens* include all of the standards imposed upon Petitioner for determination of the motion to transfer under 28 U.S.C. §1404(a) and more. Compare, *Cotton* v. *Louisville & Nashville R.R.*, 14 Ill. 2d 144, 174, 152 N.E. 2d 385 (1958) (holding, even though the factors of inconvenience are present, that only when it is shown that plaintiff is motivated by vexation and harassment will an FELA case be dismissed), with *Norwood* v. *Kirkpatrick*, 349 U.S. 29, 32 (1955), where it was said:

> "When Congress adopted §1404(a), it intended to do more than just codify the existing law on *forum non conveniens* . . . The harshest result of the application of the old doctrine of *forum non conveniens*, dismissal of the action, was eliminated . . . As a consequence, we believe that Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser showing of inconvenience. This

is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader." Accord, *Grubs* v. *Consolidated Freightways, Inc.*, 189 F. Supp. 404, 407 (D. Mont. 1960).

Therefore, the Circuit Court of Cook County, in dismissing this action on the grounds of *forum non conveniens*, considered and decided every point and question which was required to be considered by Petitioner in passing on Respondent's motion to transfer. It was improper for Petitioner to allow Filbrun to relitigate the very issues which had been determined against him in a final judgment entered by the state court. RESTATEMENT OF JUDGMENTS §45. *comment d;* §49, *comment b* (1942). The issues adjudicated by the state court, whether rightly decided or not, were required to be taken as conclusively established. *Chicago, Rock Island & Pacific R.R.* v. *Schendel*, 270 U.S. 611, 617 (1926).

In *Chicago, Rock Island & Pacific R.R.* v. *Schendel*, 270 U.S. 611 (1926), a man named Hope was killed in an accident on the line of the railroad in Iowa. Hope's administrator filed an FELA action in a Minnesota state court on February 21, 1923, alleging that Hope was engaged in interstate commerce. On March 2, 1923, the railroad instituted proceedings before the Iowa Industrial Comission alleging that Hope was engaged in intrastate commerce. The Commission so held and Hope's widow appealed to the Iowa County Court which affirmed the holding that Hope was engaged in intrastate commerce.

Later, the FELA action was heard in the Minnesota state court. That court held that the Iowa court's determination that Hope was engaged in intrastate commerce was not binding, found he was in interstate commerce, and entered judgment against the railroad. The Minnesota

Supreme Court affirmed. On appeal to this Court, the action of the Minnesota Supreme Court was reversed. This Court said:

> "The Iowa court, under the compensation law, in the due exercise of its jurisdiction, having adjudicated the character of the commerce in which the deceased was engaged, that matter, whether rightly decided or not, must be taken as conclusively established, so long as the judgment remains unmodified . . . . [T]he judgment upon the point was nonetheless conclusive as *res judicata* because it was rendered under the state compensation law, while the action in which it was pleaded arose under the federal liability law . . . ." 270 U.S. at 617.

Likewise, in the case at bar, the fact that the Illinois state court determined that a Cook County, Illinois forum was an inconvenient and inappropriate place for the trial of this action under the doctrine of *forum non conveniens,* would not make that judgment any less conclusive as *res judicata* in the determination that this action should be transferred pursuant to §1404(a).

The dissenting opinion in the Court of Appeals is predicated on the thesis that the material factual issues determined by the Circuit Court of Cook County were not the same as the factual issues presented to the District Court, in that the state court could consider the availability of a state forum in Ludington, Michigan, whereas the District Court could only consider the availability of the United States District Court sitting in Grand Rapids, Michigan. Following the logic of the dissent, it would follow that if Filbrun lived in Grand Rapids and, instead of falling off a box car in Ludington, had been injured at Grand Rapids, the material factual issues would have been identical and Petitioner would have been required to

transfer this action. The happenstance of residence and accident in a city other than Grand Rapids is not a sufficient factor upon which to predicate a judicial determination that the final judgment of the state court be held for naught.

Ludington, Michigan lies within the Western District of Michigan, Southern Division. 28 U.S.C. §102(b) (1). The fact that the United States District Court for that district normally holds Court at Grand Rapids, Kalamazoo, and Lansing, would not necessarily preclude the holding of court by special term at Ludington. 28 U.S.C. §141 provides that special terms of district court may be held at such place in the district as the nature of the business may require. *United States* v. *Tomaiolo*, 249 F.2d 683 (2d Cir. 1957). Of course 28 U.S.C. §142 provides that court shall be held at places where Federal quarters and accommodations are available or suitable quarters or accommodations are furnished without cost to the United States. Ludington may or may not have such facilities. But that is not the point. The point is that the United States District Court for the Western District of Michigan, Southern Division is not a "Grand Rapids forum". Rather it is a court for the entire district and division. 28 U.S.C. §132(a) ("There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district.") Therefore, it is not a fair distinction to say that Petitioner could only consider the availability of a "Grand Rapids forum." Ludington is as much a part of the "forum" to which transfer was sought as is Grand Rapids.

There is an additional reason why the availability of a forum in Ludington, Michigan was not a factual difference in the case before the District Court as compared with the case before the state court. Actually, a state court forum

at Ludington was just as available to Filbrun after he filed his action in the District Court as before. If Petitioner had granted Respondent's motion to transfer Filbrun's action to the United States District Court for the Western District of Michigan, Southern Division, Filbrun could, at that time, have voluntarily dismissed his action in the District Court and proceeded anew in the state court sitting in Ludington.[1] FED. R. CIV. P. 41(a)(1); *Benton* v. *Vinson*, 255 F. 2d 299 (2d Cir.), *cert. denied*, 358 U.S. 885 (1958).

Petitioner states that he gave "respectful consideration" to the judgment of the state court, yet Petitioner, in the Court of Appeals, sought affirmance of his denial of transfer as though that order never existed. In fact Petitioner gave no effect whatsoever to the final judgment of the state court. The Court of Appeals corrected this misdeed. This Court should affirm.

II. THE FULL FAITH AND CREDIT STATUTE REQUIRED TRANSFER OF THE ACTION.

The judicial proceedings of any court of any state ". . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state . . . from which they are taken."

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[1] This election would not have been available to Filbrun after the three year statute of limitations had expired. However, in this case the statute of limitations will not expire until July 15, 1963, and Petitioner's motion to transfer was presented August 23, 1961 (R. 41) and denied on Dec. 7, 1961 (R. 60).

Also the election would probably not have been available as of right after Petitioner filed its answer on January 10, 1962 but again this was done after the motion to transfer had been denied. (R. 68). *Larsen* v. *Switzer*, 183 F.2d 850 (8th Cir.), *cert. denied*, 340 U.S. 911 (1950).

28 U.S.C. §1738. Congress, through this section, has imposed on Federal courts the same duty to give full faith and credit to judgments of state courts as is imposed upon state courts by Article IV, Section 1 of the United States Constitution. *Wayside Transportation Co.* v. *Marcell's Motor Express, Inc.*, 284 F. 2d 868, 870-71 (1st Cir. 1960). That case held that a Vermont state court determination concerning jurisdiction over the defendant was binding and could not be relitigated in a United States District Court sitting in Massachusetts. The Court said:

> "Due process does not give parties the right to litigate the same question twice. *Chicago Life Insurance Company* v. *Cherry*, 1917, 244 U.S. 25, 37 S. Ct. 492, 61 L. Ed. 966. The constitutional and statutory provisions requiring full faith and credit articulate and implement the dictate of public policy 'that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties.' *Baldwin* v. *Iowa State Traveling Men's Association*, 1931, 283 U.S. 522, 51 S. Ct. 517, 518, 75 L. Ed. 1244." 284 F. 2d at 871.

A. An Illinois Court Would Have Dismissed The Action.

It is clear from decisions of the Illinois Supreme Court and Appellate Courts that if Filbrun, instead of filing his action in the United States District Court for the Northern District of Illinois subsequent to its dismissal by the Circuit Court of Cook County, had filed the same action in another state court sitting in Cook County, Illinois, his action would have been dismissed because of the conclusive determination of the Circuit Court that Cook County, Illinois was an inconvenient and inappropriate forum. In *Healea* v. *Verne*, 343 Ill. 325, 331-32, 175 N.E. 562, 565 (1931), it was said:

> ". . . [E]stoppel by verdict . . . arises when a particular material fact in any litigation has been determined in a former litigation between the same parties

> . . . in which that fact was also material to the issue. In such case the decision of the question in the former litigation is conclusive upon the parties in the latter . . . and that question cannot be litigated again between the parties in that case . . . in any subsequent action in the same court *or any other court*, whether the question arises upon the same or a different cause of action, whatever may have been the nature or purpose of the action in which the judgment was rendered or of that in which the estoppel is set up." (emphasis added)

The term "estoppel by verdict" used by Illinois courts ". . . is but another branch of the doctrine of *res judicata*," and it rests upon the same principle of law; that is, that a matter once litigated between parties to a final judgment in a court of competent jurisdiction cannot again be controverted." *Chicago Title & Trust Co.* v. *National Storage Co.*, 260 Ill. 485, 493, 103 N.E. 227, 231 (1913). *E.g.*, *Hicks* v. *Hicks*, 20 Ill. App. 2d 139, 155 N.E. 2d 355 (1959).

Accord, *Rose* v. *Dolejs*, 7 Ill. App. 2d 267, 275, 129 N.E. 2d 281, 285 (2d Dist. 1955) where it was said:

> "When some specific fact or question has been actually and directly in issue and has been adjudicated and determined by a court of competent jurisdiction in a former suit, and the same fact or question is again put in issue in a subsequent suit between parties or their privities who were parties in the former suit, its determination in the former suit, if properly presented and relied upon, is conclusive upon the parties and persons in privity with them in the latter suit, without regard to whether or not the cause of action is the same in both suits, and it cannot be again litigated in the subsequent suit upon the same or a different cause of action whatever may have been the nature of the first action or of the second action in which the estoppel is set up: *Hoffman* v. *Hoffman*, 1927, 246 Ill. App. 60. It is of first importance both in the observance

> of private rights and of the public good that a question once adjudicated by a court of competent jurisdiction shall be considered as finally settled and conclusive on the parties: *Winkelman* v. *Winkelman*, 1924, 310 Ill. 568, 142 N.E 173. Where the cause of action in the first suit is not the same as the cause of action in the second suit the court's determination in the first suit on all questions actually decided is final and estops the parties and their privities from relitigating those questions in the second suit,—such is normally denominated as estoppel by verdict or judgment, and is but another branch of the doctrine of *res judicata*, and rests on the same principles as *res judicata*: *City of Elmhurst* v. *Kegerreis*, 1945, 392 Ill. 195, 64 N.E. 2d 450."

Petitioner has never seriously contended that an Illinois court would not have dismissed Filbrun's action on the basis of the Circuit Court's judgment. (Petition for Writ of Certiorari, p. 11-12)

The remaining question is what effect does this fact have on the District Court.

B. The Final Judgment Of The State Court Should Have Been Given Effect By Transfer.

It might be argued that full faith and credit could only have been afforded the state court's final judgment by an order of dismissal in the Federal Court. In the first opinion of the Court of Appeals (R. 80), now withdrawn, this was thought by one judge to defeat Respondent's claim. Reflection and reason show that this cannot be so.

Prior to the adoption of §1404(a), which became effective September 1, 1948, the common law doctrine of *forum non conveniens* was available in federal courts in most actions. E.g., *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947). However, the availability of *forum non conveniens* in FELA

actions in federal courts was in considerable doubt because of language in *Baltimore & Ohio R. R.* v. *Kepner*, 314 U.S. 44 (1941) and the same was true in state courts, *Miles* v. *Illinois Central R. R.*, 315 U.S. 698 (1942).

With the advent of §1404(a), even in those types of actions where the common law doctrine was formerly available, the courts have uniformly held that §1404(a) occupies the field and that dismissal under common law *forum non conveniens* is no longer available. E.g., *Collins* v. *American Automobile Ins. Co. of St. Louis*, 230 F.2d 416, 418 (2d Cir.), *cert. dismissed*, 352 U.S. 802 (1956), where it was said:

> "The application of the doctrine of *forum non conveniens* by Judge Palmieri to dismiss the case was erroneous. The field of that doctrine is entirely occupied by 28 U.S.C. §1404(a), enacted in 1948 subsequent to the decision of *Gulf Oil Corp.* v. *Gilbert*, *supra*, 330 U.S. 501, 67 S. Ct. 839—the case relied upon by the judge. See *Norwood* v. *Kirkpatrick*, 349 U.S. 29, 32, 75 S. Ct. 944, 93 L.Ed. 789 (a case decided after the decision herein); *Ex parte Collett*, 337 U.S. 55, 69 S. Ct. 944, 93 L.Ed. 1207, 10 A.L.R.2d 921. If the forum is found to be inconvenient, the remedy now is transfer, not dismissal as formerly."

Accord, *Burges* v. *Proctor & Gamble Defense Corp.*, 172 F.2d 541 (5th Cir. 1949); *Harrison* v. *United Fruit Co.*, 141 F.Supp. 35, 36 (S.D.N.Y. 1956) (dictum).

The conclusiveness of the Circuit Court's judgment should not be held for naught merely because Congress, by enacting §1404(a), chose to eliminate some of the harsh effects of the common law doctrine of *forum non conveniens*. Full Faith and Credit is asked for that part of the state court judgment implicit in its order of dismissal which requires transfer under §1404(a), *i.e.*, that trial in

the local forum is not for the convenience of the parties, or of the witnesses, nor in the interest of justice. Once full faith and credit is given to the facts found, and legal conclusions determined by the state court, the appropriate remedy must follow as a matter of course, in this instance, transfer.

III. ALTERNATIVELY, THE JUDGMENT OF THE COURT OF APPEALS THAT PETITIONER ABUSED HIS DISCRETION IS CORRECT.

Contrary to Petitioner's claim on page 5 of his brief, the Court below relied in part upon the gross abuse of discretion of Petitioner, in ordering the writ of mandamus to issue. The last paragraph of the majority opinion (R. 87) carries a clear alternative holding that Petitioner did not do justice in failing to transfer this case to the district court sixty miles from Filbrun's home and the place of his accident.

From the affidavits and documents filed by both parties Petitioner had before him the following facts when he considered Respondent's motion to transfer.

1. Filbrun is a resident of Ludington, Michigan, which is approximately 300 miles from Chicago, Illinois, and approximately 60 miles from Grand Rapids, Michigan.

2. The accident of which Filbrun complains occurred in Ludington, Michigan.

3. The seven doctors and chiropractors who examined and treated Filbrun at the time of his alleged injury, and immediately thereafter, all reside in Michigan.

4. A Dr. Rabin, who did not examine or treat Filbrun until after he had retained his present Chicago attorneys to represent him, is the only witness, medical or otherwise, who does not reside in Michigan.

5. Three of the four occurrence witnesses and two railroad employees who inspected the boxcar from which Filbrun fell, all reside in Ludington, Michigan.

6. Seven of the eight medical witnesses would not be available to testify personally in Chicago, Illinois.

7. The Circuit Court of Cook County, Illinois had previously dismissed the same case between the same parties on the ground that that forum was an inconvenient and inappropriate place for the trial of this action.

A. The Convenience Of The Parties.

The material before Petitioner showed beyond doubt that the convenience of the Respondent would best be served by trial of the case in Grand Rapids, Michigan. And, since Filbrun's residence is near Grand Rapids, Michigan, there was no doubt that the first test, *i.e.*, convenience of the parties, should have been decided in favor of Respondent. *Patterson* v. *Louisville & Nashville R. R.*, 182 F. Supp. 95, 98 (S.D. Ind. 1960).

B. Convenience Of The Witnesses.

All but one of the thirteen witnesses who will testify in this case, should it be held at Grand Rapids, Michigan, reside in and around Grand Rapids. There was no showing by Filbrun that the thirteenth witness, the one who lives in Chicago, Illinois, would be unable to personally testify upon trial in Grand Rapids. In sharp contrast, the affidavit filed by the Respondent in support of its motion to transfer showed that seven of the thirteen witnesses would not be able to testify upon trial of the case in Chicago.

For these reasons Petitioner should have decided the second test, *i.e.*, convenience of the witnesses, in favor of Respondent. The only person who might be incon-

venienced by trial in Grand Rapids is Filbrun's Chicago counsel ". . . and that is not a controlling factor." *Sypert* v. *Miner*, 266 F.2d 196, 199 (7th Cir.), *cert. denied*, 361 U.S. 832 (1959).

C. The Interest Of Justice.

Petitioner should have given this test paramount consideration. Both the interests of the parties to the lawsuit, as well as society in general, should have been considered.

> "Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation has piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. . . . There is a local interest in having localized controversies decided at home." *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 509 (1947).

Other factors include the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses, and the cost of obtaining attendance of willing witnesses; the possibility of a view of the premises; and the congestion of the court calendar in the district where the case is pending compared to the calendar in the district to which it is sought to have the case transferred. *Chicago, Rock Island & Pacific R.R.* v. *Igoe*, 220 F.2d 299, 304 (7th Cir.), *cert. denied*, 350 U.S. 822 (1955).

The greatest injustice resulting from Petitioner's ruling was to foreclose Respondent from presenting the testimony in person of the seven doctors who examined and treated Filbrun immediately following his accident in July, 1960. This evidence is vital to Respondent and the subpoena powers of the United States District Court for the Northern

District of Illinois cannot be utilized to compel the attendance of those doctors in a Chicago forum. This obvious injustice should have been corrected by granting the motion to transfer. Petitioner's failure to do so was a gross abuse of discretion particularly when coupled with the finding of the state court that Filbrun was motivated purely by vexation and harassment in suing Respondent in a Cook County Court. The Court of Appeals properly corrected Petitioner's gross abuse of discretion by mandamus.

IV. MANDAMUS WAS AN APPROPRIATE REMEDY.

The availability of mandamus as a matter of jurisdiction is not in dispute. 28 U.S.C. §1651(a). In proper cases, this Court more than once has upheld the use of mandamus as an appropriate remedy. *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957); *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962); *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959).

As stated in *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943), the traditional use of the writ "... has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." Each case must be decided on the basis of whether or not the circumstances of that case make mandamus an appropriate remedy. The common thread which runs through the numerous cases in this Court which have sustained the issuance of the writ is that it will lie when rights essential to the working of the judicial process are threatened by an inferior court. Thus improper denial of the right to trial by jury is subject to the protection of mandamus, *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962) and *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 511 (1959); the right to trial by judge rather than by master is protected, *Los Angeles*

Brush Mfg. Corp. v. *James*, 272 U.S. 701 (1927) and *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957); clear abuse of discretion or usurpation of judicial power is prevented by the writ, c.f., *De Beers Consolidated Mines* v. *United States*, 325 U.S. 212, 217 (1945); and clear mistake of law is subject to correction by the writ, *Barrack* v. *Van Dusen*, 309 F.2d 953 (3d Cir. 1962) *petition for cert. filed* February 21, 1963 (No. 851).

When all is said and done mandamus is the appropriate ". . . remedy to oblige inferior courts to do that justice which they are in duty . . . bound to do . . ." *Virginia* v. *Rives*, 100 U.S. 313, 323 (1879).

The issuance of the writ here has two sources in the record for its justification; first, mandamus lies to prevent a district court from compelling a litigant to relitigate an issue previously determined between the parties in a state court having jurisdiction of the subject matter and of the parties; second, mandamus lies to correct a gross abuse of discretion in deciding an issue raised under §1404(a).

A. Respondent's Right Not To Have To Relitigate Issues Conclusively Determined By The State Court Was Entitled To The Extraordinary Protection of Mandamus.

As to the use of mandamus to prevent relitigation of an issue once decided, there is no challenge to the availability of the remedy in proper cases. *Lummus Co.* v. *Commonwealth Oil Refining Co.*, 297 F.2d 80, 86-87 (2d Cir. 1961) (Friendly, J.), *cert. denied*, 368 U.S. 986 (1962). In that case Lummus sought mandamus to prevent the district judge from re-examining an issue that had been conclusively determined in favor of Lummus by another court.

The Second Circuit held that mandamus was an appropriate remedy saying:

> "The right not to have to relitigate an issue so determined is as much entitled to extraordinary protection as the right to jury trial, [cases omitted] the right to trial before an unbiased judge, [cases omitted] or the right to trial directly by a judge rather than initially by a master, *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957). Accordingly we think the case appropriate for mandamus . . . ." 297 F.2d at 87.

Mandamus is an extraordinary remedy reserved for really extraordinary cases. *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 25-26 (1943), establishes that the Court of Appeals had power to grant the writ. The question is ". . . whether in the light of all the circumstances the case was an appropriate one for the exercise of that power." Respondent submits that the answer to that question is "yes" and therefore the decision of the Court below should be affirmed.

B. Alternatively, Mandamus Was An Appropriate Remedy To Correct Petitioner's Gross Abuse Of Discretion.

There appears to be a difference in emphasis in the Courts of Appeal as to the circumstances which must be present in a §1404(a) abuse of discretion case before mandamus will issue. Compare *Chicago, Rock Island & Pacific R.R.* v. *Igoe*, 212 F.2d 378 (7th Cir. 1954), *same case*, 220 F.2d 299 (7th Cir.), *cert. denied*, 350 U.S. 822 (1955) (mandamus lies to test a clear case of abuse of discretion in deciding a §1404(a) motion), with *Great Northern R.R.* v. *Hyde*, 238 F. 2d 852 (8th Cir., 1956), *aff'd on rehearing*, 245 F. 2d 537 (8th Cir.), *cert. denied*, 355 U.S. 872 (1957) (writ of mandamus denied to prevent implementation of a transfer order under §1404(a) on ground issuance of writ

would be an "erroneous exercise of discretion".). See also 1 MOORE'S FEDERAL PRACTICE, par. 0.147 n. 25, at p. 1966 (2d ed. 1961).

Although the availability of mandamus to correct a clear abuse of discretion in deciding a §1404(a) motion was a question not reached by this Court in *Norwood* v. *Kirkpatrick*, 349 U.S. 29 (1955), the majority considered the merits of the controversy in affirming the Third Circuit's refusal to issue a writ of mandamus and the dissent (three Justices) would have reversed on the merits. It is apparent that the issue is not *whether* mandamus lies to correct an abuse of discretion in deciding a transfer motion but *when* it lies.

The undesirability of piecemeal appeals is most often urged as a reason for denying the use of mandamus as an appropriate remedy in this situation. This, it is claimed, is an undue burden on judicial administration as well as upon the parties. Such an argument is without merit here. Were Respondent to be put to a trial on the merits, the inconvenience and injustice of which it complains would be expended prior to the time it could seek redress in a reviewing court. The consequent burden upon the parties and the judicial system would be far greater. The more sound rule would leave mandamus available and the use thereof left to those extraordinary cases which find favor upon presentation of a proper petition for leave to file a petition for a writ.

"It is submitted that the Court below in ordering the writ of mandamus to issue had ample support for use of the remedy in the failure of Petitioner to give any effect whatsoever to the final judgment of the state court, coupled with the substantive factors of inconvenience to the parties and to the witnesses, with the attendant injustice therefrom flowing.

* * *

Filbrun[2] asks this Court to establish a rule of law which would allow an FELA plaintiff multiple opportunities to contest the appropriateness of judicial forums far distant from his home and place of accident. Ignoring, or misstating, the principles of finality, public policy and repose which underlie *res judicata*, Filbrun seeks reversal of an undeniably correct decision for little reason other than that he is an FELA plaintiff. Filbrun had his day in court as to the appropriateness and convenience of a Cook County forum. The United States Court of Appeals correctly concluded that for Filbrun, like all other litigants, that was enough. This Court should affirm.

CONCLUSION.

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

CHARLES J. O'LAUGHLIN
HOLLAND C. CAPPER
Attorneys for Respondent

PHILIP W. TONE
THOMPSON, RAYMOND, MAYER
& JENNER
135 South LaSalle Street
Chicago 3, Illinois
RA 6-0220
Of Counsel

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[2] Although Petitioner is a Judge of the United States District Court, the real party in interest is Filbrun, whose counsel represents the Judge in this action.

APPENDIX

FED. R. CIV. P. 41 (a)(1)

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof

(1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23 (c), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

28 U.S.C. §102 (b)(1)

§ 102. Michigan

Michigan is divided into two judicial districts to be known as the Eastern and Western Districts of Michigan.

• • •

Western District

(b) The Western District comprises two divisions.

(1) The Southern Division comprises the counties of Allegan, Antrim, Barry, Benzie, Berrien, Branch, Calhoun, Cass, Charlevoix, Clinton, Eaton, Emmet, Grand, Traverse, Hillsdale, Ingham, Ionia, Kalamazoo, Kalkaska, Kent, Lake, Leelanau, Manistee, Ma-

son, Mecosta, Missaukee, Montcalm, Muskegon, Newaygo, Oceana, Osceola, Ottawa, Saint Joseph, Van Buren, and Wexford.

Court for the Southern Division shall be held at Grand Rapids, Kalamazoo, and Lansing.

28 U.S.C. §132 (a)

§ 132. Creation and composition of district courts

(a) There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district.

28 U.S.C. §141

§ 141. Special terms; places; notice.

Special terms of district court may be held at such places in the district as the nature of the business may require, and upon such notice as the court orders, pursuant to rules approved by the judicial council of the circuit.

Any business may be transacted at a special term which might be transacted as a regular term.

28 U.S.C. §142

§ 142. Accommodations at places for holding court

Court shall be held only at places where Federal quarters and accommodations are available, or suitable quarters and accommodations are furnished without cost to the United States. The foregoing restrictions shall not, however, preclude the Administrator of General Services, at the request of the Director of the Administrative Office of the United States Courts, from providing such court quarters and accommodations as the Administrator determines can appropriately be made available at places where regular terms of court are authorized by law to be held,

but only if such court quarters and accommodations have been approved as necessary by the judicial council of the appropriate circuit.

28 U.S.C. §1445 (a)

§ 1445. Carriers; non-removable actions.

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51-60 of Title 45, may not be removed to any district court of the United States.

28 U.S.C. §1651(a)

§1651 Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

ILL. REV. STAT. ch 110, §77 (1961):

Judgments, decrees and orders subject to review—Leave to appeal from an order granting a new trial.

(1) Appeals shall lie to the Appellate or Supreme Court, in cases in which any form of review may be allowed by law, to review the final judgments, orders or decrees of the circuit court, the superior court of Cook County, the county courts, the city courts and other courts whose judgments, orders and decrees are reviewable therein, under such limitations and conditions as may be imposed by law and subject to rules.

(2) An appeal may be taken from an order granting a new trial on leave granted by the reviewing court, or by a judge thereof in vacation, on notice to adverse parties and petition presented to the reviewing court within 30 days after the entry of the order or within any extended period granted upon notice

given and motion filed within the 30 days or any extensions thereof. Application for an extension of time shall be accompanied by such record and other documents as may be prescribed by rule. The ruling of the court upon a petition for leave to appeal from an order granting a new trial is not reviewable.

(3) Leave to appeal shall first be obtained only if expressly required by law. As amended by act approved July 19, 1955. L. 1955, p. 2238.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1963

No. 32

THE HONORABLE JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division,

Petitioner,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

JOHN J. NAUGHTON
120 Madison Building
Chicago 2, Illinois
Attorney for Petitioner.

FRANKLIN-SPEALY COMPANY, CHICAGO 308

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

The Brief for Respondent does not answer the Petitioner's Brief but instead ignores both it and the 2nd Opinion of the Court of Appeals granting a writ of mandamus. This is done by arguing that the issuance of the writ was compelled by *res judicata* (pps. 6-14). This argument was anticipated in my Brief (pps. 9, 10) and is further erroneous because it equates a federal District Court with a Cook

County Court. The material factual issues are different when that error is alone corrected and also for reasons stated in the dissent below (R. 87-91). The situation is not clarified by characterizing the residence of the plaintiff as a "happenstance" (Brief, p. 13).

Respondent's treatment of the reason for the decision below, the requirements of full faith and credit, ineptly restates the majority opinion of the Seventh Circuit. Its statement that Petitioner has never seriously contended that an Illinois Court would not have dismissed on the basis of the Circuit Court's judgment (p. 17) is a misrepresentation of Petitioner's position raising the point that all of the courts of the state were not closed to the plaintiff in this case (Brief for Petitioner, p. 12). Indeed, even other Cook County Courts might have retained the underlying cause of action if the question had been presented to them because no rule of law requires the second county court to dismiss.

Respondent next contends that Petitioner abused his discretion. No such question is here involved since both the majority and dissenting opinion refused to decide that question in Respondent's favor.

Respondent's final contention is that mandamus was proper. Mandamus, however, is no substitute for appeal. *Aday* v. *U. S. Dist. Ct. for W. D. of Mich.*, 6th Cir., 318 F. 2d 588, 591 (1963). An interlocutory appeal was available under *28 U. S. C. 1292 (b)* passed by Congress to provide for review of orders under *28 U. S. C. 1404 (a)*, 62 Stat. 937. *In re Humble Oil & Refining Co.*, 5th Cir., 306 F. 2d 567, 568 (1963). Denial of petitions for mandamus serves salutary purposes in respecting congressional purpose and in preventing interlocutory reviews of what are by their nature discretionary orders. Any other course will encourage piecemeal appeals in cases which are not extraordinary.

CONCLUSION

For the reasons stated in the Brief for Petitioner as well as in this Reply Brief and because of the demands of law and of substantial justice, the judgment of the Court of Appeals for the Seventh Circuit granting a Writ of Mandamus should be reversed.

Respectfully submitted,

JOHN J. NAUGHTON,
120 Madison Building
Chicago 2, Illinois
STate 2-5925,

Attorney for The Honorable James B. Parsons, United States District Judge, Petitioner.